S. HRG. 100-520

IMPLEMENTATION OF THE SWAMPBUSTER PROVISION OF THE 1985 FARM ACT

HEARING

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON APPROPRIATIONS UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

SPECIAL HEARING

Printed for the use of the Committee on Appropriations

U.S. GOVERNMENT PRINTING OFFICE

82-890 O WASHINGTON : 1988

For sale by the Superintendent of Documents, Congressional Sales Office
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S181-27

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IMPLEMENTATION OF THE SWAMPBUSTER PROVISION OF THE 1985 FARM ACT

TUESDAY, JANUARY 26, 1988

U.S. SENATE,
SUBCOMMITTEE ON AGRICULTURE, RURAL DEVELOPMENT,
AND RELATED AGENCIES,
COMMITTEE ON APPROPRIATIONS,
Washington, DC.

The subcommittee met at 9:53 a.m. in room SD–138, Dirksen Senate Office Building, Hon. Quentin N. Burdick (chairman) presiding.

Present: Senators Burdick, Bumpers, Harkin, Kasten, and Grassley.

DEPARTMENT OF AGRICULTURE

AGRICULTURE STABILIZATION AND CONSERVATION SERVICE

STATEMENT OF MILTON J. HERTZ, ADMINISTRATOR

OPENING REMARKS

Senator BURDICK. Good morning, ladies and gentlemen. I have scheduled this hearing today to determine how the Department of Agriculture is implementing the Swampbuster provisions of the 1985 farm bill and to determine what effect Swampbuster is having on our farmers.

In my state of North Dakota, Swampbuster has created controversy because much of the Red River Valley is likely to be classified as wetlands. This will have a profound effect on the manner in which North Dakotans may farm their land.

I have talked with many groups and individuals about Swampbuster over the past several months. During these meetings, farmers have expressed confusion about what they may or may not do in managing their land. They fear that using farming practices that are common in the region will cause them to lose farm program benefits.

They also feel singled out unfairly. Many are excellent stewards of the land and realize they must protect their natural resources. Many farmers are concerned about the environment, and they seek to protect the plants and animals found on their land.

I believe it is time to sit down and deal with the current controversy swirling around the implementation of Swampbuster. We have seen increased polarization between agricultural and environmental communities, as well as within USDA itself. This situation is unfortunate,

because I believe that we all agree our land and our wildlife must be protected.

Protecting wetlands is an important component in protecting many species of wildlife. No one will refute the many values of wetlands, especially for wildlife and water management. However, we must find a way to protect wildlife without being unduly intrusive into the way farmers manage their land. We need to find a common ground and work together.

One thing that must be done immediately is to educate farmers better about their responsibilities and potential penalties under Swampbuster. Much of the current confusion appears to stem from the lack of understanding.

Simultaneously with this education, SCS must move quickly to make wetland determinations. We are into the 1988 crop season, and many landowners need to have a determination for their land. Without a determination, it is very difficult for producers to plan their farming operation. Much of the confusion will be resolved after farmers and local SCS representatives meet to make these determinations and explore options.

We must all work together to make Swampbuster an effective program. I am hopeful that this hearing will facilitate cooperation between all concerned interests and that we will gain insight into the Swampbuster problems.

We have 13 witnesses today who will be asked to sit in panels. The first panel is composed of Milton Hertz, Administrator of the Agricultural Stabilization and Conservation Service, and Mr. Wilson Scaling, Chief, Soil Conservation Service.

In the interest of time, since we have anticipated a good number of witnesses, we will limit the statements to 5 minutes. The questions from the chairman will not be counted in the 5 minutes, and the whole statement will be made a part of the record. So we will ask now the first witness, Milton Hertz, to proceed as you wish.

STATEMENT OF MILTON HERTZ

Mr. HERTZ. I thank you, Mr. Chairman. I appreciate the opportunity to appear here before you today and discuss the various applications of the conservation title of the Food Security Act of 1985 and the regulations necessary to carry out these sections.

Early on, an interagency working committee was appointed to develop these regulations, and it included all of the USDA agencies that would be involved in administering the conservation title.

Principally, this would involve ASCS, the Soil Conservation Service, Farmers Home Administration, Federal Crop Insurance Corporation, Extension Service, the Office of the General Counsel, and the U.S. Fish and Wildlife Service of the Department of the Interior.

ASCS' responsibilities for administering the wetland provisions include determining whether:

The conversion of a particular wetland was commenced prior to December 23, 1985, which was the date of the enactment of the legislation;

The conversion of a wetland was caused by a third party, and;

Conversion of a wetland by a landlord's tenant or sharecropper is required under the terms and conditions in the landlord-tenant agreement.

ASCS' responsibilities are carried out in the field in part by state ASC committees and county ASC committees. ASCS will also consult with the U.S. Fish and Wildlife Service on pending commenced or third-party determinations.

Other USDA agencies have their own specific responsibilities for administering provisions of the legislation.

To implement the provisions of the conservation title, an interim rule was developed and was filed with the Federal Register on June 24, 1986, and became effective as of that date. The interim rule initially provided a 60-day comment period, but that period was later extended to allow interested parties further time to comment.

During that period, USDA received 2,696 comments. Entities responding included individuals, corporations, environmental groups, farm commodity groups, water districts, financial institutions, Members of Congress, and others.

After a thorough review of the comments, major issues were defined and option papers were prepared by issue for agency heads to review and approve. Among the issues which were addressed was the exemption under the wetland conservation provisions for the conversion of wetlands that had commenced before December 23, 1985.

The final rule was published in the Federal Register on September 17, 1987.

In order to clarify the criteria with respect to whether a wetland conversion had been commenced before December 23, 1985, the regulation was revised in the final rule to specifically address situations involving activities of drainage districts or similar entities which have authority to levy an assessment on individuals for the completion of drainage projects.

Under the provisions of the final rule, the activities of such entities will, if certain conditions are met, be considered to be commencement of conversion by persons within the district.

Among other conditions, the district or other entity must have, prior to December 23, committed substantial funds to the project either by entering into contracts to move earth or by purchasing supplies or materials for the project, and the person seeking benefits from USDA must show that the conversion involved was the basis of an assessment by the district or other entity prior to that date against the person's property.

It should also be noted that while a producer planting an agricultural commodity on a converted wetland without a determination of exemption will be ineligible to receive program benefits for that crop-year,

such producer could regain eligibility for program benefits for the next crop-year by not planting an agricultural commodity on the converted wetland.

As you know, Mr. Chairman, several interagency and ASCS regional meetings have been held to discuss and explain the provisions of the act and the regulations. Several people from my staff participated in a regional interagency meeting in Fargo in November during which a frank and open discussion was held among ASCS, SCS, and the Fish and Wildlife Service representatives to reach a unified and cooperative approach to administering the provisions of the new Swampbuster legislation.

PREPARED STATEMENT

Mr. Chairman, this concludes my statement, and I will be happy to respond to any questions you or other members of the subcommittee may wish to ask.

[The statement follows:]

STATEMENT OF MILTON J. HERTZ

Thank you, Mr. Chairman. I appreciate the opportunity to appear before you and other Members of the Subcommittee today to provide you with information concerning the development and implementation of regulations for Highly Erodible Land Conservation (known as "sodbuster") and Wetland Conservation (known as "swampbuster") authorized under Sections 1201-1223 and 1241-1245 of Title XII of the Food Security Act of 1985 (the Act), P.L. 99-198.

Section 1244 of the Act requires the Secretary of Agriculture to issue the regulations necessary to carry out those sections of the Act. An interagency working committee was appointed to develop regulations implementing the provisions of the Act. Among USDA agencies represented on the committee were the Agricultural Stabilization and Conservation Service (ASCS), Soil Conservation Service (SCS), Farmers Home Administration (FmHA), Federal Crop Insurance Corporation (FCIC), Extension Service (ES), Office of the General Counsel, (OGC) and the U.S. Fish and Wildlife Service, Department of the Interior.

ASCS responsibilities for administering the wetland conservation provisions of the Act include determining whether:

(1) The conversion of a particular wetland was commenced before December 23, 1985 (the date of enactment of the legislation.

(2) The conversion of a wetland was caused by a third party.

(3) Conversion of a wetland by a landlord's tenant or sharecropper was acquiesced in or is required under terms and conditions in the landlord tenant agreement.

ASCS' responsibilities are carried out in the field in part by State ASC committees and county ASC committees. ASCS will also consult with U.S. Fish and Wildlife Service on pending "commenced" or third party determinations.

Other USDA agencies have their own specific responsibilities for administering provisions of the legislation.

An interim rule implementing the sodbuster/swampbuster provisions was filed with the Federal Register on June 24, 1986, and became effective as of that date. The interim rule initially provided a 60-day comment period ending August 26, 1986, but that period was later extended to October 25, 1986, to allow interested parties further time to comment. During that period USDA received 2,696 comments. Entities responding included individuals, corporations, environmental groups, farm commodity groups, water districts, financial institutions, Members of Congress, and others.

After a thorough review of the comments, major issues were defined and option papers were prepared by issue for agency heads to review and approve. Among the issues which were addressed was the issue of the exemption under the wetland conservation provisions for the conversion of wetlands that had "commenced" before December 23, 1985.

The final rule was published in the Federal Register on September 17, 1987.

In order to clarify the provisions of the regulations with respect to whether a wetland conversion had been "commenced" before December 23, 1985, the regulation at 7 C.F.R. 12.5 was revised in the final rule to specifically address situations involving the activities of drainage districts or similar entities which have authority to levy an assessment on individuals for the completion of drainage projects. Under the provisions of the final rule, the activities of such entities will, if certain conditions are met, be considered to be a "commencement" of conversion by persons within the district. Among other conditions, the district or other entity must have, prior to December 23, 1985, committed substantial funds to the project either by entering into contracts to move earth or by purchasing supplies or materials for the project and the person seeking benefits from USDA must show that the conversion involved was the basis for an assessment, by the district or other entity, prior to that date, against the person's property.

It should also be noted that while a producer planting an agricultural commodity on a converted wetland without a determination of exemption will be ineligible to receive program benefits for that crop year, such producer could regain eligibility for program benefits for the next crop year by not planting an agricultural commodity on the converted wetland.

As you know, Mr. Chairman, several interagency and ASCS regional meetings have been held to discuss and explain the provisions of the Act and the regulations. Several people from my staff participated in a regional interagency meeting in Fargo on November 19, 1987, during which a frank and open discussion was held among ASCS, SCS, and the Fish and Wildlife Service representatives, to reach a unified and cooperative approach to administering the provisions of the new swampbuster legislation.

This concludes my statement, Mr. Chairman, and I will be happy to respond to any questions you or Members of the Subcommittee may wish to ask.

SOIL CONSERVATION SERVICE

STATEMENT OF WILSON SCALING, CHIEF

ACCOMPANIED BY GALEN BRIDGE, DEPUTY CHIEF OF PROGRAMS

Senator BURDICK. I think we will defer questions of you until we have heard from Mr. Scaling. I think we will take you both at the same time.

Mr. Scaling.

Mr. SCALING. Thank you. Mr. Chairman and members of the committee, I am happy to have the opportunity to appear before your committee to discuss activities of SCS in implementing the wetland conservation or Swampbuster provision of the Food Security Act of 1985.

Following enactment of this legislation, the USDA established an internal working group to develop interim rules to implement the program. This group consisted of staff members from ASCS, SCS, Farmers Home Administration, and Federal Crop Insurance Corporation. U.S. Fish and Wildlife Service was consulted throughout the rulemaking process, as required by the act.

An interim rule implementing the program was filed on June 24, 1986. USDA has received many comments on this. After review of the comments, a final rule was published on September 17, 1987. This final rule reflects changes based upon USDA's experience in administering the interim rule, a USDA pilot test of the wetland identification methods of the interim rule conducted from July 7 to July 25, 1986, in six states, public comments to the interim rule, and further consultation with the Fish and Wildlife Service.

Several major issues had to be addressed and resolved as a result of the interim rule. Those included: Defining commenced; identifying those lands meeting the definition of wetland; determining which lands were converted or for which conversion had commenced prior to the act and, therefore, were exempted; and determining what constitutes a minimal effect on the hydrological and biological aspects of a wetland.

The development and publication of the final rules on September 17 for implementing Swampbuster has been a major accomplishment since passage of the act. The end result is a set of rules that we believe provide a balanced approach to implementing the program.

Numerous comments were received concerning determination of minimal effects relative to wetland conversion. The final rule maintains the Soil Conservation Service environmental evaluation process as the mechanism for determining minimal effect.

Language was added, however, that precludes further alteration of converted wetlands which were subject to a minimal effects determina-

tion unless subsequent alterations are also determined to have minimal effect. In addition, the final rule does not preclude the possibility of considering the merits of mitigation on a case-by-case basis in the course of making a minimal effects determination.

While the converted wetland criteria in the regulations exempt certain wetlands converted prior to December 23, 1985, from program restrictions, it should be noted that potholes, playas, and other seasonally flooded or ponded wetlands are protected from additional conversion.

Specifically, potholes, playas, and depressions that are flooded and ponded for extended periods are not considered converted wetlands despite manipulations prior to December 23, 1985, if the area continues to meet the wetland criteria. Persons may continue to farm those areas in the same manner that they did prior to December 23, 1985. However, actions cannot be taken which affect the water regime in those areas beyond the conditions that existed on the land on or before December 23, 1985.

The final rule expressly precludes bringing new additional wetland acreage into production through maintenance and improvement. However, present drainage systems can be maintained and improved so long as additional wetland is not converted as a result of that improvement. Additional wetlands include wetlands and previously converted wetlands that have reverted as a result of abandonment of crop production and management or maintenance operations.

As of October 1, 1987, SCS has made wetland determinations on approximately 750,000 acres on 34,000 farms. This land meets the definition of wetland as contained in the act; that is, it has a predominance of hydric soils and, under normal circumstances, supports a prevalence of hydrophytic vegetation. Three states, North Dakota, South Dakota, and Minnesota, account for nearly one-half of those determinations.

There have been an estimated 1,640 appeals of technical determinations made by SCS on wetlands. Of these, most have been resolved at the SCS field office or county office level with only 20 reaching the SCS National Headquarters here in Washington as of October 1, 1987.

In spite of the efforts that we made to assist producers in becoming aware of the provisions of the 1985 act, questions have continued to arise about the Swampbuster restrictions. This has been particularly true in North Dakota, where a high percentage of the cropland requires drainage to make cropping possible.

It appears that some producers are not sure which lands meet the wetland definition and which are exempt because they were converted or conversion was commenced prior to December 23, 1985.

One of the major concerns that has been expressed by producers, particularly in the Red River Valley of North Dakota, relates to low areas in fields that have been farmed for many years. The wetland definition of the act states that:

> * * * The term wetland * * * means land that has a predominance of hydric soils and that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that, under normal circumstances, does support the prevalence of hydrophytic vegetation typically adapted for life in saturated soil continues.

There has been and continues to be a question among farmers as to what is meant by the term "normal circumstances." In House Report 99–271, Part II, page 16, the Committee on Merchant Marine and Fisheries stated:

> Within the definition of the term wetlands, the term "normal" is intended by the committee to make clear that areas that are saturated by surface or groundwater but have had wetland vegetation destroyed are, nevertheless, considered wetlands for the purpose of this act. The term "normal" is not intended to require any particular frequency or duration of flooding, saturation or ponding.

The committee guidance does not differentiate as to whether the destruction of the hydrophytic vegetation occurs during normal cultivation processes carried out over many years, or whether the destruction occurred subsequent to the act in an attempt by producers to alter conditions so that a tract of land would not meet the definition of wetland.

USDA defined normal circumstances to refer to the soil and hydrologic conditions that are normally present without regard as to whether the vegetation has been removed and, in the event that the vegetation on such land has been altered or removed, SCS will determine if a prevalence of hydrophytic vegetation typically exists in the local area on the same hydric soil under the same hydrologic conditions.

Accordingly, even if the vegetation had been removed at a normal cultivation, the land is considered wetland unless it has been previously converted by dredging, filling, draining, or some other method.

To help minimize uncertainty, SCS instituted a major effort to map the lands in the Red River Valley and the Devils Lake area of North Dakota so that producers could know with confidence which lands are subject to the act and which are not. We are using a series of aerial photographs that have been taken in July of each year for the last 7 to 10 years.

We intend to complete this effort by March 15, 1988. We believe that to identify those areas in the wetlands and those that are not, or have been previously converted and are thus exempt, will alleviate the uncertainty and concern that has been felt by producers in the area.

PREPARED STATEMENT

Mr. Chairman, I appreciate you letting me run overtime. That does conclude my statement, and I, like Mr. Hertz, will be happy to answer any questions you might have. Thank you, sir.

[The statement follows:]

STATEMENT OF WILSON SCALING

Mr. Chairman, and Members of the Committee, I am happy to have the opportunity to appear before your committee to discuss activities of the Soil Conservation Service in implementing the wetland conservation "swampbuster" provision of the Food Security Act of 1985.

Following enactment of this legislation, the U.S. Department of Agriculture (USDA) established an internal working group composed of staff members from USDA agencies involved, including the Agricultural Stabilization and Conservation Service, the Soil Conservation Service, Farmer's Home Administration, and the Federal Crop Insurance Corporation to develop interim rules to implement the program. The U.S. Fish and Wildlife Service of the U.S. Department of the Interior was consulted throughout the rulemaking process as required by the Act. An interim rule implementing the program was filed with the Federal Register on June 24, 1986, and was effective immediately. The comment period was originally scheduled to end on August 26, 1986, but was extended until October 25, 1986.

USDA received 2,696 letters containing 8,400 comments in response to the interim rule. Entities responding included individuals, corporations, environmental groups, state and local governments, federal agencies, farm commodity groups, water districts, financial institutions, members of Congress, and others. Comments came from all states except Alaska and Hawaii.

After review of the comments, a final rule was published in the Federal Register on September 17, 1987. The final rule reflects changes based upon USDA's experience in administering the interim rule, a USDA pilot test of the wetland identification methods of the interim rule conducted from July 7 to July 25, 1986, in six states, public comments to the interim rule, and further consultation with the Fish and Wildlife Service.

Several major issues had to be addressed and resolved as a result of the interim rule. These included, defining "commenced"; identifying those lands

meeting the definition of wetland; determining which lands were "converted" or for which conversion had commenced prior to the Act and therefore exempted; and determining what constitutes a "minimal effect" on the hydrological and biological aspects of a wetland.

The development and publication of final rules on September 17, 1987, for implementing the swampbuster program has been a major accomplishment since passage of the Act. The end result is a set of rules that we believe provide a balanced approach to implementing the program.

Valuable experience was gained through pilot tests conducted in Illinois, Nebraska, California, Maryland, North Dakota, and Mississippi. These states represented a range of differences such as staffing, progress in soil surveys, extent of agricultural water management activities, types of agriculture, and types of wetland. The tests indicated that, in general, the interim rule provided a reasonably good basis for program implementation.

The final rule clarified what constitutes commencement of conversion prior to December 23, 1985, and insured that commencement was based on one or more of the following criteria: (a) that the conversion activity actually started before December 23, 1985; or (b) the person expended or committed substantial funds by entering into a contract before December 23, 1985, for the conversion activity or for construction materials and supplies directly related to the conversion.

The final rule provides that a person seeking a determination of conversion commencement must request the determination before September 19, 1988, and demonstrate that the wetland conversion has been actively pursued and will be completed by January 1, 1995.

Numerous comments were received concerning the determination of minimal effect relative to wetland conversion. The final rule maintains the Soil Conservation Service (SCS) environmental evaluation process as the mechanism for determining minimal effect. Language was added, however, that precludes

further alteration of converted wetlands which were subject to a minimal effects determination unless subsequent alterations are also determined to have minimal effect. In addition, the final rule does not preclude the possibility of considering the merits of mitigation on a case-by-case basis in the course of making a minimal effects determination.

While the converted wetland criteria in the regulations exempts certain wetlands converted prior to December 23, 1985, from program restrictions, it should be noted that potholes, playas, and other seasonally flooded or ponded wetlands are protected from additional conversion.

Specifically, potholes, playas, and depressions that are flooded and ponded for extended periods are not considered converted wetlands despite manipulations prior to December 23, 1985, if the area continues to meet the wetland criteria. Persons may continue to farm those areas in the same manner they did prior to December 23, 1985. However, actions cannot be taken which affect the water regime in those areas beyond the conditions that which existed on the land on or before December 23, 1985.

The final rule expressly precludes bringing new additional wetland acreage into production through "maintenance and improvement." However, present drainage systems can be maintained and improved so long as additional wetland is not converted as a result of the improvement. Additional wetlands include wetlands and previously converted wetlands that have reverted as a result of abandonment of crop production and management or maintenance operations.

The third party conversion provisions were amended under the final rule to provide a limited exemption for farmers whose wetlands are drained through events beyond their control. The responsibility has been placed on the farmer seeking the benefits to show that the drainage was not part of a "scheme or device" to avoid compliance with the Act and regulations.

Comments were also received concerning the exemption for the production of agricultural commodities on wetland during a period of drought. The comments

suggested that wetland that can be cultivated for a lengthy period of time should not come within this exemption and that restrictions be placed on the use of herbicides with regard to agricultural commodity production under this provision.

No changes were made as a result of these comments. The provisions of the 1985 Act expressly allows farming of wetland during dry years without regard to the number of years that the natural conditions are dry enough to permit farming. As to the suggested restrictions on herbicides, the use of approved herbicides is a part of normally accepted farming procedure and, therefore, the final rule did not impose any restrictions.

As of October 1, 1987, SCS has made wetland determinations on approximately 750,000 acres on 34,000 farms. This land meets the definition of wetland as contained in the Act--having a predominance of hydric soils and under normal circumstances supports a prevalence of hydrophytic vegetation. Three states--South Dakota, North Dakota, and Minnesota--account for nearly one-half of these determinations. Our determinations of converted wetland so far cover about 28,000 acres on 1,000 farms. Five states--North Carolina, South Dakota, Oregon, Minnesota, and Illinois--account for over one-half of the converted wetland determinations. Of the numerous wetlands evaluated for minimal effect only 600 acres based on 15 determinations met the minimal effect criteria.

There have been an estimated 1,640 appeals of technical determinations made by SCS on wetlands. Of these, most have been resolved at the SCS field (county) level, with only twelve reaching the SCS National Headquarters.

In spite of the efforts that we made to assist producers in becoming aware of the provisions of the 1985 Act, questions have continued to arise about the Swampbuster restrictions. This has been particularly true in North Dakota where a very high percentage of the cropland requires drainage to make cropping possible. It appears that some producers are not sure which lands meet the wetland definition and which are exempt because they were converted, or conversion was commenced, prior to December 23, 1985. One of the major

concerns that has been expressed by producers, particularly in the Red River Valley of North Dakota, relates to low areas in fields that have been farmed for many years. The wetland definition in the act states:

"The term wetland... means land that has a predominance of hydric soils and that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions." There has been, and continues to be a question among farmers as to what is meant by the term "normal circumstances."

In House Report 99-271, Part II, page 16, the Committee on Merchant Marine and Fisheries stated: "Within the definition of the term wetlands, the term "normal" is intended by the committee to make clear that areas that are saturated by surface or groundwater but have had wetland vegetation destroyed are nevertheless considered wetlands for the purpose of this Act. The term normal is not intended to require any particular frequency or duration of flooding, saturation, or ponding."

The Committee guidance does not differentiate as to whether the destruction of the hydrophytic vegetation occurred during normal cultivation processes carried out over many years or whether the destruction occurred subsequent to the Act in an attempt by a producer to alter conditions so that a tract of land would not meet the definition of wetland.

USDA defined "normal circumstances" to refer to the soil and hydrologic conditions that are normally present without regard as to whether the vegetation has been removed, and in the event that the vegetation on such land has been altered or removed, SCS will determine if a prevalence of hydrophytic vegetation typically exists in the local area on the same hydric soil under the same hydrologic conditions. Accordingly, even if the vegetation had been removed through normal cultivation, the land is considered wetland unless it has been previously converted by dredging, filling, draining, etc.

To help minimize uncertainty, SCS instituted a major effort to map the lands in the Red River Valley and the Devils Lake area of North Dakota so that producers can know with confidence which lands are subject to the Act and which are not. We are using a series of aerial photographs that have been taken in July each year for the past seven to ten years.

We intend to complete this effort by March 15, 1988. We believe that to identify those areas that are wetlands and those that are not, or have been previously converted and are thus exempt, will alleviate the uncertainty and concern that has been felt by producers in the area.

That concludes my prepared statement, Mr. Chairman. With the help of my staff, I will be happy to answer your questions.

Thank you.

STATEMENT OF SENATOR KASTEN

Senator BURDICK. Before I proceed to the questions of the witnesses, Senator Kasten of Wisconsin has entered the committee room.

Do you have an opening statement?

Senator KASTEN. Mr. Chairman, thank you very much. I do have a brief opening statement of about 3 or 4 minutes which I would like to present, if I may.

Senator BURDICK. Please proceed.

Senator KASTEN. First of all, let me thank you for holding these hearings on wetlands protection and, particularly, the Swampbuster provisions of the 1985 farm bill.

On May 1, 1985, I introduced the Fragile Lands Conservation and Wetlands Protection Act of 1985. This legislation contained proposals for protecting highly erodible land, taking fragile land out of production and protecting wetlands.

My guiding principle in introducing this legislation was very simple: Federal farm programs should not in any way encourage practices that damage vital natural resources like soil and wetlands. I was, therefore, pleased to see that many of the ideas in my original legislation were enacted as part of the 1985 farm bill. I was especially pleased that Congress decided to make wetlands protection a priority in the operation of our farm programs.

The so-called Swampbuster provision was a key provision of the conservation title of the farm bill. It should be vigorously enforced.

I would like to review for just a moment why we in the Congress view wetlands protection as being such a high priority. Simply put, wet-

lands are a vital part of our environment and a vital part of our economy. Wetlands recharge ground water, help prevent floods, and improve water quality by removing nutrients from organic compounds and chemical fertilizers before they reach rivers and lakes.

Wetlands are also unique and irreplaceable sources of habitat for wildlife, ranging from furbearing animals in the Great Lake states to large animals like the alligator and the Florida panther in the Southeast. Much of this wildlife, in addition to its intrinsic value, is important to the economies of many states. No one kind of wildlife is more important economically than waterfowl, and no one area of wetlands is more important to waterfowl than the prairie pothole region of the Great Plains.

In 1984, the National Wetlands Inventory was very clear on this point. "Prairie potholes," it said, "are the most valuable inland marshes for water protection in North America." Not only are they the most productive of the continent's waterfowl breeding areas, importantly, over 50 percent of its crop of ducks come from prairie potholes. North Dakota alone supports almost half the breeding duck population of the lower 48 states.

These wetlands have been under continual assault from many forces. One of these is conversion to cropland. Such conversion, along with flood control projects and other causes, has reduced pothole wetlands in the Dakotas from 7 million acres originally to just over 3 million acres today. Over 9 million acres of pothole wetlands in Minnesota have been drained already.

The impact of this destruction of habitat on our nation's waterfowl has been devastating. Small, shallow prairie wetlands, many of them flooded for only part of the year, are primary nesting areas. When wetlands are drained or converted to crop production, waterfowl must depend on ever smaller wetland acreage for their food, especially aquatic invertebrates. They are also more exposed to predators.

It is no wonder that the migratory waterfowl population is at an all-time low. The population of mallard ducks in North America has dropped from 11 million birds to 5.5 million since the late 1960's, while the pintail population has fallen from 8 million to less than 3 million, according to the joint United States-Canada Commission that worked out the North America Waterfowl Management Plan.

It was largely the concern that this habitat destruction be halted that led me to include a Swampbuster provision in my 1985 legislation. Similarly, concern that destruction of thousands of wetland acres in Nebraska's rainwater basin not be repeated elsewhere led the late Democratic Senator Ed Zorinsky of Nebraska to include Swampbuster language in the soil conservation bill he produced soon after I introduced mine.

I have been greatly concerned, Mr. Chairman, by reports that Swampbuster is being enforced in a lax and irregular manner in some of the states where the most important wetlands are located. I have been told, for example—and I am going to ask about this when we

have an opportunity for questions—that only two farmers in the entire country have been denied farm program benefits under the Swampbuster law, and the law has now been in place for over 2 years.

I would like to believe that this is the result of broad compliance with the Swampbuster law. But I fear that the reverse is true.

Frankly, the initial implementation of the law in pothole regions appeared to have been bungled. Not enough attention was given by USDA to making rapid, accurate determinations of what constitutes a wetland and what does not. In an absence of these determinations, it appears as if the Swampbuster law is simply being ignored, especially in North Dakota.

I would like to submit for the record two examples that have been brought to my attention of clear violations of Swampbuster in that state that were not acted upon by either the county or the state ASCS offices.

Obviously, USDA should make every effort to let farmers know what steps they need to take to avoid not being in compliance with the law, but simple distaste for the law is no excuse for ignoring it. If there are USDA employees in any state who think that the way around a difficult or unpopular law is simply not to enforce it, those employees should be replaced.

Some people have the impression, and it is a mistaken impression, that farmers should not worry about Swampbuster since Congress is going to repeal it anyway. That simply is not the case. The conservation title of the farm bill represented a clear statement of Congress' intention not to let the resources we and our children will depend upon be sacrificed in the interests of doing things the way things always have been done.

I look forward, Mr. Chairman, to this hearing and asking questions of the representatives, particularly from the USDA. I think it is time to stop complaining about the law and to begin working on ways to live with it. Thank you, Mr. Chairman.

Senator BURDICK. Thank you.

Senator Bumpers.

STATEMENT OF SENATOR BUMPERS

Senator BUMPERS. Mr. Chairman, I am pleased you are holding this hearing and, maybe, more hearings. I have not been involved actively in the concerns about this issue since the farm bill in 1985 was originally passed.

I must say that I would normally be opposed to any changing of the desire of Congress against draining wetlands and putting any more land into production at this time. I am not up to speed on what has happened with the regulations, but I have been advised that the regulations were not promulgated until September 1987. I just heard my distinguished colleague from Wisconsin say that only two farmers in the entire United States have had their federal farm subsidies challenged as a result of this provision. Is the Senator correct?

Senator KASTEN. I intend to give Mr. Hertz and Mr. Scaling a chance to respond to that. That was my statement, and that is my understanding from the research that we have been able to do.

Senator BUMPERS. It is my understanding that there are special concerns in North Dakota and the other Plains states. Although I am not familiar enough with the terrain there and the topography and the geography to comment, I might be willing to even go out there and look at it.

But my sympathies at the moment are against anything except the strictest enforcement of the provisions as we intended.

But I, having said that, will keep as open a mind as I can during the process of these hearings. I thank the chairman.

Senator BURDICK. Senator Grassley.

Senator GRASSLEY. I have no statement at this point, or questions, Mr. Chairman.

WETLAND MANAGEMENT COMMITTEE RECOMMENDATIONS

Senator BURDICK. At the outset, before beginning the questions, I would like to enter into the record a letter from the Governor of North Dakota. A Wetland Management Committee has been established in North Dakota to deal with wetlands issues in the state. Recently, this committee met to discuss the Swampbuster provision. The committee came up with four recommendations, and I want these to be part of the record, and I would like your comments on that.

I also share with you and include a membership list of the wetland committee.

[The information follows:]

Letter From George A. Sinner, Governor, State of North Dakota

January 21, 1988

The Honorable Quentin Burdick
Chairman
Agricultural Subcommittee on Appropriations
ATTENTION: Vicki Hicks
511 Hart Office Building
Washington, D.C. 20510

Dear Senator Burdick: Quentin

The North Dakota Wetlands Management Committee has been established as a result of negotiations between U.S. Fish and Wildlife Service Regional Director Galen Buterbaugh and myself to provide a forum for communications and cooperation regarding wetland issues in North Dakota. As you can see by the enclosed membership list, the group represents a broad range of perspectives on the issue.

The Wetlands Management Committee met on January 19 to discuss areas of agreement on the topic of Swampbuster, and the enclosed statement expresses the consensus of the broad range of interests represented on the Wetlands Management Committee.

Because of the diverse views and interests of the Wetlands Management Committee, we believe that these recommendations are worthy of careful consideration by your committee. We appreciate the opportunity offer these suggestions for your deliberation.

Sincerely,

George

George A. Sinner
Governor

Recommendations of North Dakota Wetlands Management Committee Regarding Swampbuster

Adopted: January 19, 1988

1) Wetland Determinations: Farmers are concerned that individuals might be found in violation of swampbuster guidelines, even though a determination of wetland areas and converted wetland areas on farmers' fields may not have been made by Soil Conservation Service (SCS) personnel. We urge that the SCS give the wetland determination process a high priority to achieve a speedy determination of wetland areas and converted wetland areas for purposes of the swampbuster provisions.

2) Compliance: We support the compliance provisions of the Food and Security Act. However, there may be varying degrees of violations of the compliance provisions; therefore, penalties that vary to fit the nature of the infraction should be adopted.

Farmers, who inadvertantly violate Swampbuster provisions and who have not had wetland determinations made for their fields, should be able to restore wetlands to come back into compliance with the law. Also, farm program benefits should not be withheld from individual producers until the governing agency has proved that there has been a conversion of wetlands.

3) USDA's "Highly Erodible Land and Wetland Conservation Certification" Form 1026: We feel that two sections of this form--sections 7 and 8--presume a producer's guilt, if he or she answers "yes" to either question. For instance, in Question 8, the language, "Do you plan to convert any land including wet areas for the production of an agricultural commodity. . ." is vague. The term "wet areas" may or may not mean wetlands.

The form is extremely negative and offers a farmer no help in requesting determination of wetland acreage on his or her land. We prefer a positive, clear-cut approach that indicates whether or not a farmer intends to drain a wetland, whether or not a farmer intends to clean out an existing drain, and whether or not a farmer wants a wetland determination.

4) Compensation: As the Swampbuster provision is now written, farmers are restricted from exercising their managerial prerogatives to the land. We support programs that provide annual compensation to landowners for wetland protection.

WETLANDS MANAGEMENT COMMITTEE

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11/23/87

DEVELOPMENT OF SWAMPBUSTER REGULATIONS

Senator BURDICK. Mr. Hertz and Mr. Scaling, I will ask the first question of both of you, if you care to comment. I understand that USDA received thousands of comments on the interim regulations and that these comments led to changes to these regulations. Please review the main areas of controversy that arose over the draft rules to implement Swampbuster and your response to those controversies in the final rule. Will you please outline the major issues relating to Swampbuster that required the lengthy delay between the issuing of the draft rule in June 1986 and the final rule in September 1987?

I will ask Mr. Hertz first.

Mr. Hertz. Mr. Chairman, I would like to submit more information in written form at a later date, but I will try to summarize in a general way the approach that the agencies took in formulating the final regulations.

I think the point has to be made that the final rule contains provisions that are far stricter than the interim rule, and certainly, the comments that we received and the discussions that we had in the agency and with the Fish and Wildlife Service of the Department of the Interior led to these decisions to tighten the rule.

It was our best judgment that that was the direction that the regulations should go. I think as you look at the overall implementation of the regulations in the final rule, we have followed those guidelines and have been, I think, very strict in the determinations that have been made in both of our agencies.

The fact that we haven't had farmers who have lost program benefits, I think, indicates that maybe we even over-administered the provisions of the Swampbuster because we had farmers coming into ASCS offices signing forms saying that they were going to move dirt or they had an intention that would possibly affect their program benefits.

Those farmers then went to the Soil Conservation Service to make the determinations, and to my knowledge, farmers were very sensitive to this and really did not move dirt until they had the concurrence or nonconcurrence of both agencies.

Senator BURDICK. Mr. Scaling, do you have any comment?

Mr. SCALING. No, sir.

MINIMAL EFFECT EXEMPTION

Senator BURDICK. In what situations do you expect to apply the minimal effect exemption?

Mr. HERTZ. I believe that is on the technical side.

Mr. SCALING. Minimal. Excuse me just a second, sir. Would you like to handle that, Galen, since you put the right words in it? I would like for my Deputy Chief of Programs to answer that since he can get the right technical words in the right place, sir. This is Mr. Galen Bridge.

Mr. BRIDGE. Mr. Chairman, we would expect the application of the minimal effect to be rather limited. It is in those situations where we have a very minor effect on the wildlife values associated with that wet-

land, and we just don't expect that we would have very many of those. There might be some mitigating circumstances where a wetland could be replaced somewhere else, but again, we see very little of that happening.

Senator BURDICK. In determining minimal effect, doesn't that require a lot of guessing?

Mr. BRIDGE. No; we have an evaluation system.

Senator BURDICK. There are no certain rules here, are there?

Mr. BRIDGE. We have an evaluation system that is set up in our technical procedures where our field people go through the guidance of several factors in terms of making that decision and, in many cases, we are also consulting with the U.S. Fish and Wildlife Service or the local state people.

Senator BURDICK. It seems to me that it requires a little discretion to make that determination.

Mr. BRIDGE. It requires discretion and some professional judgments; you are right, sir.

Senator BURDICK. Entering the committee room is the able Senator from Iowa. Do you have an opening statement?

Senator HARKIN. No; I do not. Thank you, Mr. Chairman.

MITIGATION

Senator BURDICK. How will mitigation, such as compensating for the loss of one wetland area by creating another, affect the use of the exemption?

Mr. BRIDGE. Again, let me reply to that. We really, truly feel that there will be very little use of mitigation. If we truly have wetlands associated with this act as the act defines them, we would see very limited use of the mitigation aspect.

Let me be quick to say that in a project setting or in the drainage district or something like that where we have gone through the NEPA process, set up some mitigation kinds of activities, reached agreement with the Fish and Wildlife Service on that mitigation and so on, certainly, it could apply in the project setting. Mitigation, well, I think I just want to conclude with that.

Senator BURDICK. Looking at the final regulations in more detail, several changes have been suggested by producers and producer interest groups to make them more flexible while still adhering to the basic goals of the law. All have been suggested at some time during the legislative or rulemaking processes. I ask that you respond to each of these questions and suggestions:

WETLAND SIZE

One: One alternative suggestion is to exempt wetland areas below a certain size.

What is your opinion, any one of you?

Mr. BRIDGE. I am a little reluctant to answer that. Under the present act, we do not think that we can do that. We have had lots of discussions during the rulemaking process. Is there a minimum size wetland

that no longer has wetland values associated with that of a pond? I have no opinion on that right now.

Mr. HERTZ. Mr. Chairman, I might add, that in the several discussions that were held in preparing the final rule, size, minimal size, was certainly discussed, but given the requirements, if you will, for designating a wetland, we felt that size was not a criterion under the guidelines of the law.

Senator BUMPERS. Mr. Chairman, would you yield for a question?

Senator BURDICK. Certainly.

DEFINITION OF WETLAND

Senator BUMPERS. In that connection, how is the wetland defined? I mean, if you have a wetland in the spring and it is dry in the summer and the fall, is that exempted? What is the definition of a wetland under these regulations?

Mr. BRIDGE. I will go back to some very scientific principles in terms of what hydric soil is, and that is based on the soil survey conducted by the Soil Conservation Service under those standards, and the other piece of that, you also have to have hydrophytic vegetation.

Senator BUMPERS. Hydro what?

Mr. BRIDGE. Hydric.

Mr. SCALING. H-y-d-r-i-c.

Senator BUMPERS. Soils?

Mr. SCALING. Hydric soils and hydrophytic vegetation.

Senator BUMPERS. What is hydrophytic?

Mr. SCALING. That is vegetation that lives or thrives in water or in wet areas.

Mr. BRIDGE. It is one criteria that you use to make the decision as to whether you have a wetland. If you have both hydric soils and hydrophytic vegetation or that soil can support hydrophytic vegetation; then it is considered a wetland.

Senator BUMPERS. So it would not matter, then, whether it is wet in the spring or dry in the summer or whether it is a pothole or a pond?

Mr. BRIDGE. If it is hydric soil, first of all, it had to be wet enough so it can——

Senator BUMPERS. Sustain hydrophytic vegetation.

Mr. BRIDGE. Right. It cuts off the supply of oxygen in soil and supports hydrophytic vegetation as a result.

Senator BUMPERS. On a year-round basis?

Mr. BRIDGE. Yes.

Senator BUMPERS. Thank you, Mr. Chairman.

WETLAND SIZE

Senator BURDICK. Suppose we have a farm with 640 acres and there is a pothole in that area of less than one-fourth of an acre. Would you be opposed to the exemption in that particular case, which may be dry most of the year? What about that?

Mr. BRIDGE. Personally, I would not be concerned about its exemption.

Senator BURDICK. This is not an unusual situation, by the way.

Mr. BRIDGE. That is right, it isn't. I go back again. I think under the law as it is now proposed or is now enacted, we cannot exempt those small areas.

Senator BURDICK. You cannot?

Mr. BRIDGE. We can take a look at them from a minimal effect approach. I personally would think that probably one-fourth of an acre would be minimal, but at the same time, you have to look at the surrounding countryside and how long that area is ponded and so on and what it really supports in terms of wildlife habitat.

Senator BURDICK. Do you think that the present legislation is broad enough to include some remedy for a situation like that?

Mr. BRIDGE. Yes, sir; under the minimal effect determination.

Senator BURDICK. What would the remedy be?

Mr. BRIDGE. The remedy would be that we could perhaps make a minimal effect determination on those areas that were very small, a quarter acre or less, of some minimal size.

Senator BURDICK. Would the local committee be authorized to move that condition?

Mr. BRIDGE. Not in terms of a blanket approach. They do not have that authorization now.

Senator BURDICK. Who would give me the authority to drain what is left of that little pond? Who would that be?

Mr. BRIDGE. I think we would have to consult with the Fish and Wildlife Service on that in terms of any national policy if they would decide that they were willing to go with an exemption on one-fourth acre.

Senator BURDICK. ASCS wouldn't decide; it would be Fish and Wildlife?

Mr. BRIDGE. Soil Conservation Service.

Senator BURDICK. Mr. Hertz, would you have any authority?

Mr. HERTZ. Mr. Chairman, the technical evaluations of the wetlands is all done by the Soil Conservation Service. I believe that is the way the act was written; that ASCS is the administering agency as far as coordination, but all the technical aspects fall with the Soil Conservation Service.

Senator BURDICK. The illustration I gave you a few minutes ago is not unusual in North Dakota. This happens quite frequently, and this has incensed some of the farmers that have a little spot in their whole operation and they have to go around it with their machinery. It causes delays and so forth. A large part of the year it is dry, anyway.

Mr. BRIDGE. Mr. Chairman, I think it makes a great deal of difference whether we are talking about a pothole which is one-fourth of an acre in size or whether we are talking about an intermittent wetland out there that only retains water for a short period of time.

Senator BURDICK. Well, the answer to this question I raised now is that it can be remedied, but it has to be remedied by the Fish and Wildlife Service.

Mr. BRIDGE. No; that is not right. We would like to consult with the Fish and Wildlife Service, but that decision is from the Soil Conservation Service.

Senator BURDICK. Excuse me, Soil Conservation Service.

Mr. BRIDGE. Right.

Mr. HERTZ. Mr. Chairman, I might point out, too, that if these wetlands have been farmed over time, and there is a year or two that the farmer cannot farm them because it would be too wet to get equipment into them, even for a couple of weeks in the spring, a farmer can still continue to farm those areas, even though they are considered wetlands.

Senator BURDICK. Do you have a comment, Mr. Scaling?

Mr. SCALING. No; I agree with that, sir. You can continue to farm just the way that you have in the past. There is no restriction on that.

Senator BURDICK. There wouldn't be a penalty on any of the farm programs?

Mr. SCALING. No, sir.

Senator BURDICK. But if they attempt to drain it or fill it in, that is a different story.

Mr. SCALING. Yes, sir; that is what triggers it. As long as you continue to do the same as you have in the past, you are all right. You can improve drainage, you can improve maintenance, but you just can't change the water regime. You can't bring any more land into production. That is basically what it says.

Senator BURDICK. You should have corrected that before December 23; then you would have been OK?

Mr. SCALING. Yes, sir.

TYPE I WETLANDS

Senator BURDICK. The next alternative is to exempt type I wetlands completely from Swampbuster. What do you think about that?

Senator BUMPERS. Mr. Chairman, what was the question, again, please?

Senator BURDICK. To exempt type I lands under the act.

Mr. BRIDGE. Again, I can't really reply to that very well, because I suspect many of the type I wetlands under the act——

Senator BURDICK. Would you explain what type I wetlands are?

Mr. BRIDGE. Type I wetlands are those that are seasonally flooded for short periods of time, and they are defined by the U.S. Fish and Wildlife Service in a bulletin that they publish. They tend to be flood plains, seasonally flooded areas in the spring and so on for fairly short durations of time. I would expect that a very high percentage of the flood plains, of the type I wetlands, are not considered wetlands under this act.

Senator BURDICK. This makes it a little difficult. You say they exclude some and not all?

Mr. BRIDGE. Yes; again, depending on the duration of flooding, whether those lands are inundated long enough to make them hydric soils is the key to it. If those lands stay saturated for a period long enough to develop hydric soils, or those are hydric soils, then they would be subject to the act, and that definition will not track exactly with type I wetlands.

Senator BURDICK. Who makes the determination if type I wetlands will be exempt? What portion? Who would make the determination?

Mr. BRIDGE. Soil Conservation Service.

VARIABLE PENALTIES

Senator BURDICK. Soil Conservation Service. Another suggestion is to make the penalty fit the violation so that the penalty is not the same for a willing violation as it is for inadvertent violations. Do you make any distinction between the willing and the incidental?

Mr. HERTZ. Mr. Chairman, in ASCS procedure, in what we call a failure to fully comply, there is a reduction in the farmer's benefits commensurate to the amount of violation that he has committed.

However, the language in the Swampbuster/Sodbuster provisions says that if there is a violation, all program benefits will be withheld. We have an example that is in our office right now of the farmer that supposedly has plowed up 1.7 acres of highly erodible land, and he and his son are losing $100,000 in benefits.

In other words, 1.7 acres of plowing is equal to a $100,000 penalty, whereas in our other programs, the penalty would be based on the ratio of those acres to all program acres on the farm.

We are talking right now to see if we can't use our failure to fully comply provisions in those kinds of situations.

CROP HISTORY EXEMPTION

Senator BURDICK. Another alternative suggested is to exempt land that has been cropped repeatedly, perhaps 3 of the last 5 years. What would you think of an exemption based on that?

Mr. BRIDGE. In the initial procedures we created quite a lot of confusion with that, I think, in North Dakota. We did use a crop history kind of an approach in making wetland determinations. After we looked at the comments that came in and began to field check and field test some of our procedures, we decided that that really wasn't a very good basis for making wetlands determinations.

You can cite the weather patterns and this type of thing. Certainly, crop history does give you some indication of whether you have had previous drainage and some of those kinds of activities go on there which permitted that crop production and may be an indicator in terms of whether they are already converted. But we don't feel that using crop history is a legitimate basis under the act.

Senator BURDICK. So any rule that would say 4 years out of 5 or 8 years out of 10, or 7 years out of 10, whatever that is, that doesn't comport well with your views; is that right?

Mr. BRIDGE. Yes; I think it is inconsistent with the definitions in the act—let me put it that way—as they presently exist.

Senator BURDICK. I know that, but I wonder if we can't correct the act a little bit to make it more palatable.

Mr. BRIDGE. It could be meaningful.

Senator BURDICK. You would be against that?

Mr. BRIDGE. No.

Senator BURDICK. You wouldn't be against a change of that kind?

Mr. SCALING. No, sir.

Mr. BRIDGE. No, sir; I don't think we would.

Mr. SCALING. No.

Senator BURDICK. Think about that, then.

EFFECT ON PRODUCTION

How much land do you foresee will be taken out of productien through Swampbuster?

Mr. HERTZ. Mr. Chairman, I would like to respond to that. I would say, given a farmer's normal cropping patterns and the way he has farmed the land over time, none of it will be.

Mr. SCALING. Not any of it will.

Mr. HERTZ. Our intent is not to create a hardship by saying, "Mr. Farmer, you can't farm something that you have been farming over time," but on the other side, it is to say that no new wetlands can be brought into production, either. They are sacred, so to speak.

I think we can make farmers understand that; that is where we want to be.

Senator KASTEN. Would the Senator yield on that point?

Senator BURDICK. Just a minute. I am going to yield to the rest of the panel for a short time now because I have asked quite a few questions. I have more to come, so I yield to you, Senator Kasten.

Senator KASTEN. Thank you, Mr. Chairman. Let me just make a point. This is the key issue. We are not taking land out of production. What we are saying is don't drain and fill up more of these swamps, and pothole wetlands that are not now in production and that are now important wildlife habitat and part of the vital environmental resources of North Dakota, South Dakota, and the United States of America, if you want to continue to receive farm program benefits. That is the key.

No one here is saying take land out of production. What we are saying is don't put more unsuitable land into production when we don't need more land in production and when we can't afford to continue to lose these valuable resource wetlands that we have left.

DEFINITION OF WETLANDS

Let me, if I can, just pick up on this wetland determination issue. I think these issues are the kinds of issues that the Congress ought to be deciding, and we shouldn't be putting you in the position of saying what is meant by very vague legislative language. The authors of this legislation worked hard to try to give you guidance. We are not talking

about the small muddy spot that a tractor gets stuck in, but we are talking about small, seasonally flooded wetlands, because they are among the most important resources for nesting waterfowl, and we do want those covered by Swampbuster, and we don't want that changed.

Whether that is a type I wetland or how that is going to be worked out ought to be indicated by Congress, that is our job to work through, and we are prepared and willing to work through and try to refine and revise those definitions.

But what I am concerned about, and what environmental groups are concerned about is that the USDA is going to go too far in granting Swampbuster exemptions to farmers who drain these so-called nuisance wetlands. These are the small areas that are flooded only part of the time, but they are key waterfowl habitat. The fact that they are so shallow makes them suitable for nesting waterfowl, and that is very important.

It is very, very important that we recognize this. But we will take that responsibility in terms of trying to work with you on these definitions. I really don't think it is fair to you to say how many type I wetlands are involved with Swampbuster. Congress has tried to wrestle with this, and it is not easy. That is why these hearings are so important.

Did you want to respond to what I am saying, Mr. Scaling?

Mr. SCALING. Yes; I do, Senator. I guess I would like to say that I don't think that there is any more land being brought into production. That is the key, as you say, the key to Swampbuster.

We are not advocating any more drainage. You can improve what you have as long as you don't bring any more land into production, and I don't think any more land has been brought into production unless it had commenced prior to December 23, 1985. That is the only additional land that we know of that would be coming into production.

Senator KASTEN. That was the underlying premise, and I simply wanted to underline that when we talk about whether or not we are losing production.

Mr. SCALING. Yes, sir. Yes, sir.

Senator KASTEN. That is the point. We are not losing land in production as part of this thing. The question is additional acres which probably are unsuitable being put into agriculture production, and losing valuable wetland resources, stopping this is the point of Swampbuster.

ENFORCEMENT OF SWAMPBUSTER LAW

Let me go back to my original question and maybe you can help me through this, Mr. Hertz. Can you tell the subcommittee how many farmers in the United States of America, all across the country, have been denied benefits under the Swampbuster law? How many farmers across the country and how many farmers have been denied benefits in North Dakota?

Mr. HERTZ. Mr. Chairman, I wouldn't be able to answer that question right now. I do know that we have several appeals in progress, both in the Soil Conservation Service and in ASCS, and at this point in time,

the final judgments have not been made on them. I don't know of anyone that has been denied benefits so far.

Senator KASTEN. All right. The information that I have, after meeting with some groups, including those that have been in touch with your office, is that there are two. In 2 years, there have been two farmers who have been denied benefits under the Swampbuster law.

One of those farmers is in Minnesota; the other farmer is in Georgia. No farmer in the Dakotas or the Great Plains, to my knowledge, has been denied benefits in 2 years and, yet, that is the part of the country from which the uproar and the pressure on you and your office is coming from.

Now, are you saying to me that, despite the pressure and the uproar, that the program is working well, there is not a danger of putting more land into production and that everyone is working along with this? That doesn't make sense. Two farmers in 2 years? Who is out there enforcing this?

Mr. HERTZ. I think the determinations that have been made by SCS and the compliance forms that the farmers have had to sign through ASCS have put each individual producer on notice. The farmer, I think, is very conscious of his program benefits, and to our knowledge, we just haven't had any abuse.

Senator KASTEN. Let me suggest that there is a difference between being put on notice and, in fact, actually following through with the provisions of the law. Let me ask the same question in a slightly different way, trying to measure the degree that you people are working with this law.

How many farmers have appealed an ASCS Swampbuster determination, and how many of these appeals have been in North Dakota, South Dakota, or the Great Plains?

Mr. HERTZ. I would have to do some research to get those.

Senator KASTEN. The answer to that question is none, according to the information that we have. I would be very happy if you could point out to me how I am wrong or why I am wrong. That is the purpose of this hearing.

Mr. HERTZ. There are appeals in process.

Senator KASTEN. In North Dakota and the Great Plains?

Mr. HERTZ. Yes; and I think, again, the appeals that the ASCS would be involved in would generally deal with the commenced determination.

Senator KASTEN. You were talking about the relationship between the Fish and Wildlife Service, ASCS, and the Soil Conservation Service in response to questions to the chairman.

It has been reported that although the Fish and Wildlife Service in North Dakota reported over 150 potential violations to local ASCS offices, that the ASCS has acknowledged receiving only 83 of these reports from all sources, including the Fish and Wildlife Service. Those sources are Fish and Wildlife, neighboring farmers, all possible sources of such reports.

They say there are only 83. Fish and Wildlife has on file 150. So you are off by half right now, not counting reports from neighboring farmers or other sources.

How can you explain the discrepancy, and what, in your view, ought to be the role of the Fish and Wildlife Service in using its resources and its expertise to assist the USDA in enforcing Swampbuster?

Mr. HERTZ. I would have to say, Senator Kasten, that in the judgment of the ASCS county offices, the violations did not occur to the extent that Fish and Wildlife determined they did.

Senator KASTEN. Are you simply going to accept the judgment of the ASCS office every time? I mean, obviously, the question is: Does Fish and Wildlife have one idea of how this law should be enforced, and the ASCS office, instead, is saying it is going to go away; Congress is going to repeal it, so that we don't have to have to work very hard in enforcing the law.

That is the underlying premise of this series of questions. How can you show me that that is wrong?

Mr. HERTZ. Let me say, first of all, Senator Kasten, that the message, the management message, if you will, that we have given to our county offices is that we have a law to administer, and the procedure that we have is a national procedure. We want everyone to administer it in the same way.

Senator KASTEN. That is what the Congress wants also; that is correct.

Mr. HERTZ. I might say that with 2,800 county offices out there, we probably have 2,800 different personalities, as far as the county committees are concerned, and their judgments in some cases may not be the same.

The same comparison can be said of the Fish and Wildlife Service. The definition of what a wetland is or what a violation might be isn't always interpreted in the same way.

I think our county offices are doing a good job of making determinations if there is a violation. I know that the Fish and Wildlife Service has a very vested interest in the issue and, I think, in some cases want to give us more help than we are asking for.

They are seeing it, I believe, from a much stricter view than we are in interpreting the regulations. I would have to stand behind our county offices and say that they are making the correct determinations out there, and if the Fish and Wildlife Service is saying we are only catching half the violations, I want to check into that. I want to know why.

Senator KASTEN. You haven't taken benefits away from anybody, so you are not catching anybody right now. My point was simply that on the reports of violations from all sources, including neighbors, Fish and Wildlife Service and others, you have had 150 of them, and you have only reported receiving 83. You haven't acted on any of them. But you have reports. You have not even acknowledged receiving half the reports that we know from other sources have been filed with your ASCS offices, and that is a problem.

I think that it is time I yielded back any time I have remaining. I just want to say in conclusion that a number of us want to work with you. My questions are not meant to be antagonistic; they are meant to be helpful. But we have got to make this process work. We are not taking land out of production, but we want to be sure that we are not permitting the destruction of wetlands and putting lands into production unnecessarily.

We will work with you on these definitions, but you have got to work with us and get your ASCS people out there in the counties to start to work with this discrepancy between Fish and Wildlife on the one side and ASCS offices on the other. We have got to find a meeting ground in here, and we probably both have to move a little bit toward the center.

Senator BURDICK. Would the Senator from Wisconsin attempt to minimize the problem by saying we have had 2 years of operation? As a matter of fact, the final rules were not made final until September of last year. Does that sound right?

Mr. SCALING. Yes, sir.

Senator BURDICK. So we are talking about a very short period of experience; I mean, just over the winter months.

Mr. HERTZ. You have to look at when the regulations were filed, and that was in June 1986.

Senator BURDICK. But they didn't become final until September of last year.

Mr. HERTZ. That is true.

Senator BURDICK. The Senator from Arkansas.

AERIAL PHOTOGRAPHY

Senator BUMPERS. Does the Soil Conservation Service have accurate and adequate aerial photographs, say, of North Dakota as of December 1985 so that you can determine what, if any, changes have been made in lands there?

Mr. SCALING. Yes, sir.

MITIGATION LAW IN NORTH DAKOTA

Senator BUMPERS. I can't quite figure out how you can reconcile a state law, knowing of the no-net-loss law in North Dakota, with the provision of the Swampbuster provision of the Farm Act of 1985? As I understand it, the no-net-loss law, which is a state act and really none of our concern, unless it was used to try to subvert the national law, is a law that says that in North Dakota, for example, if you drain, you have got to put something else back into a wetland? Is that what it means?

Mr. HERTZ. Senator Bumpers, I will respond to that. I believe you are right. That is, the state law requires no net loss; if you drain 10 acres, you have to establish 10 acres.

We have viewed the state law as not having any impact on the Swampbuster provisions of the Food Security Act, and we are moving

forward based on our regulations, and how North Dakota handles their state law, I guess, is their business and we are not involved in that.

Senator BUMPERS. How would you reconcile that? If the Swampbuster bill says that you will not drain and receive payments, period, and I don't know of any exceptions in there, how would one make the decision that this 10 acres that a farmer is draining and which, we will say, is a good duck habitat and has been for 100 years, is equivalent to 10 acres someplace else which has no hydrophytic vegetation, and in which it may take years before it develops? How could you ever reconcile that?

Mr. HERTZ. Senator Bumpers, let me state at this point, we don't have the tradeoff provision.

Senator BUMPERS. Don't have what?

Mr. SCALING. Mitigation.

Mr. HERTZ. The ability to drain and to replace in the Swampbuster regulations.

Senator BUMPERS. We agree that the state law is a nullity as compared to the Swampbuster law?

Mr. HERTZ. Well, it would be in conflict.

Senator BUMPERS. I am not asking you to insult the legislature of the people of North Dakota, but I don't see how we can reconcile those two laws.

Mr. HERTZ. I would say that we are administering our law as we have to, and, in fact, the North Dakota law doesn't go into effect, I believe, until July. Sometime prior to that, if they are going to pursue this, why, there will have to be an understanding whether it is going to meet the requirements of the federal law.

SWAMPBUSTER FINANCIAL INCENTIVES

Senator BUMPERS. I think I feel a big lawsuit coming on.

The stick here is that if you violate the Swampbuster provisions, you lose your right to any federal farm program payments. The Swampbuster bill doesn't say you can't drain; but if you do it, you lose the right to deficiency payments, loans, price supports, et cetera. Now, let's assume that all of a sudden, tomorrow, commodity prices exceed target levels. There is no incentive left to comply with the Swampbuster provision, is there?

Mr. HERTZ. That is right, sir.

Senator BUMPERS. Then let's assume further that 2 years from now, the bottom drops out. Meanwhile, the people in the Plains States have drained thousands of acres of land because the prices of these commodities are very high.

I can remember in 1973, we drained an awful lot of wetland and cleared other lands in Arkansas because soybeans were, like, $12, $13 a bushel; rice was $15 a bushel. We were about to clear the entire state.

Of course, that happy circumstance didn't last very long, but my point is this: If you take away the stick here, and then 2 years from now the bottom drops out, can you keep that farmer from getting back into the program?

Let the record show that somebody down there is nodding yes.

Mr. SCALING. Senator Bumpers, it is just this simple: If he has drained wetlands since December 23, 1985.

Senator BUMPERS. From now on.

Mr. SCALING. Yes, yes, sir; that is the way the law reads. Galen?

Mr. BRIDGE. One slight exception to that, though. He can drain those wetlands, and if he does not ever plant a commodity on them, in other words, an annually tilled crop, they are not subject to the act. They can drain those wetlands and put them back into permanent grass and so on and escape the impact of this particular act.

Senator BUMPERS. It is correct to state that there is no prohibition against draining if you don't farm?

Mr. BRIDGE. That is exactly right.

Senator BUMPERS. So nobody loses anything. They don't lose their benefits on existing land if they drain but don't farm. Right?

Mr. BRIDGE. Right.

Mr. SCALING. Yes, sir.

Senator BUMPERS. If I have a 100-acre farm and I have 10 acres of potholes and I drain those potholes but don't farm them, I am still eligible for program benefits?

Mr. SCALING. Yes, sir.

Mr. BRIDGE. Yes, sir.

Senator BUMPERS. Maintaining wildlife habitat and keeping additional land from being put into production are two of my main concerns. I am a conservationist, and I am concerned about wildlife habitat, and North Dakota, as I understand it, produces about 50 percent of all the ducks bred in this country every year with these potholes. It is not just a question of the size of the potholes; it is a question of the number of them. It takes both.

But my point is, it seems to me that the regulations ought to be tightened instead of loosened.

Mr. BRIDGE. I think that is part of the point that was in answer to Senator Kasten, the fact that there is a lot of drainage that may have gone on, and we have found nobody in violation of that yet probably is due to the fact that they did not plant an annual crop. As long as no crop was planted on the drained area, the producer is not in violation.

In other words, they got the word early enough. We were out there or whatever. With Swampbuster they tear down the drainage and they said, "If you try to come out here, you are in trouble."

Senator BUMPERS. I can't see any economic reason why a farmer would drain land if he weren't planning to farm it, but by the same token, it seems to me that we have a pretty big loophole in the law. Also, just pursuing Senator Kasten's questions about how many people have actually been disciplined or sanctioned under this proposal, you say there are a lot of appeals pending?

I take it you mean these are appeals from your decision to take people out of the program for violations, is that correct, and they are appealing your decision? What are these appeals?

Mr. SCALING. There are 1,640 appeals that have all been settled either at a local or a state level.

Senator BUMPERS. But they are appeals from what?

Mr. SCALING. On the determination if it was a wetland or not.

Senator BUMPERS. So they are not appealing a decision that you have made that they are in violation? They are appealing a decision that you have made that certain property on their farms is a wetland?

Mr. SCALING. Yes, sir.

Mr. BRIDGE. That is right.

Senator BUMPERS. Those 1,640 appeals, does that include Swampbuster and Sodbuster, or is that just Swampbuster?

Mr. SCALING. Just Swampbuster, sir.

Senator BUMPERS. We are not here for any other reason, but what about the Sodbuster? Do you have appeals from that?

Mr. SCALING. Yes.

Senator BUMPERS. How many?

Mr. SCALING. I don't know.

Senator BUMPERS. I realize you didn't come prepared to talk about Sodbuster today. I have been looking at some newspaper clips from North Dakota about the Fish and Wildlife Service doing a lot of aerial reconnaissance, and apparently some people in North Dakota thought that was unlawful spying and so on. Has there been a conflict between either ASCS or SCS and the Fish and Wildlife Service, and if so, what about?

Mr. SCALING. To my thinking, sir, to my knowledge, the Soil Conservation Service has consulted with Fish and Wildlife on determining wetlands in the Dakotas or anyplace else as far as that goes. We are the technical agency, and we work with Fish and Wildlife or consult with them in making these determinations.

Senator BUMPERS. In conclusion, what we in Congress were trying to do was to preserve wildlife habitat and also keep additional land from being put into production.

I can't imagine in today's farm economy why anybody would want more land in production, but presumably they would, they do, or we wouldn't be here this morning.

PROGRAM IMPLEMENTATION

But would you agree with me that this law has a couple of pretty big loopholes in it?

Mr. SCALING. No, sir.

Senator BUMPERS. You would not?

Mr. SCALING. Senator Bumpers, I honestly believe if the Congress will give us the time, the amount of time in here, I can't tell you what that time is, but let us work through this for a year; let us work with ASCS; let us work with the agriculture community; let us work with the environmental community; but mostly, let the Soil Conservation Service, in consultation with Fish and Wildlife, have a period of time to work with each other here, because I know we can work this out.

The Fish and Wildlife Service and SCS are becoming closer all the time. You know the value of these potholes that you speak of is the fact that they are farming. They are farmed in the way they have always been. The fact that there is food down in these potholes is what makes them so available. I don't think there are any more potholes being drained. I do know, also, that there is a Mr. Dunkle who wants to lease some potholes in the southern plains for the purpose of doing some test on them. There is some evaluation. I think if you will just give us some time, we can make this work.

Senator BUMPERS. Can you assure me there is not going to be any draining going on during this period of time, during the next year?

Mr. SCALING. No, sir, I can't.

Senator BUMPERS. Why not? The law was passed in 1985.

Mr. SCALING. I can assure you if there is any draining going on, there will not be any USDA benefits granted.

Senator BUMPERS. That is what I want to hear.

Mr. SCALING. Oh, yes, sir. I am sorry. Yes, sir. That, I can assure you.

Senator BUMPERS. I am concerned that you can say go ahead and drain as long as you don't farm it. Of course, I don't know why anybody would want to do that unless he was just betting that come sooner or later this law is going to be repealed.

Mr. SCALING. I just don't think that is going to happen, sir. Go ahead, Galen.

Mr. BRIDGE. I think most of that relates to the fact that if drainage was started well after the act and people were not well informed and so on. This thing came down on people rather rapidly.

Senator BUMPERS. Do you have any discretion for a farmer like that?

Mr. BRIDGE. No; the only thing you can tell that person is, "Don't plant a commodity." We recognize he wasn't aware of the act but don't plant it.

Senator BUMPERS. Don't plant it.

Mr. BRIDGE. But I don't think those people have any economic incentive to go on and drain additional lands now that they know about it.

Senator BUMPERS. Thank you, Mr. Chairman.

Senator GRASSLEY. Mr. Chairman?

Senator BURDICK. Senator Grassley?

UNIFORMITY OF ENFORCEMENT

Senator GRASSLEY. Mr. Chairman, maybe this isn't a problem, since my colleagues who are on top of this issue haven't raised the question of whether or not this law is going to be uniformly enforced around the country or whether some sections of the country might be treated differently than others. That was the subject of a letter I had addressed to Secretary Lyng back on July 29, and it is also the subject of an opening statement that I want to put in the record, Mr. Chairman.

[The statement and letter follow:]

STATEMENT OF SENATOR GRASSLEY

MR. CHAIRMAN, I WOULD LIKE TO INSERT FOR THE RECORD A COPY OF A LETTER THAT I SENT TO SECRETARY LYNG LAST SUMMER. THIS LETTER EXPRESSES CONCERNS BROUGHT TO MY ATTENTION BY IOWANS, AND CONCERNS THAT I FULLY SHARE WITH REGARD TO THE POSSIBILITY OF LOOSENING SOIL CONSERVATION STANDARDS UNDER THE SWAMPBUSTER AND SODBUSTER PROVISIONS.

AS MY LETTER EXPLAINS, I OPPOSE ANY LOOSENING OF THESE PROVISIONS THAT WOULD GIVE ONE SECTOR OF THE FARM ECONOMY A LEG UP ON THE OTHER.

I AM NOT INSENSITIVE TO THE ECONOMIC IMPACT THAT THESE PROVISIONS HAVE ON FARMERS. BUT THE BOTTOM LINE IS THAT CONGRESS FULLY INTENDED TO ELIMINATE GOVERNMENT-MADE INCENTIVES - FARM PROGRAM BENEFITS - THAT ENCOURAGE SODBUSTING AND SWAMPBUSTING LAND THAT SHOULD NEVER HAVE BEEN BROUGHT INTO PRODUCTION IN THE FIRST PLACE.

CONGRESS EXPRESSED ITS CONCERN ABOUT THE ECONOMIC IMPACT BY PROVIDING FARMERS FIVE YEARS TO DRAFT AND IMPLEMENT THEIR SOIL CONSERVATION PLANS.

I AM OPEN TO REVIEWING THE EFFECTIVENESS AND IMPACT OF THIS LAW, BUT AGAIN, IF CHANGES ARE TO BE MADE, THEY NEED TO BE MADE FAIRLY.

LETTER FROM SENATOR GRASSLEY

The Honorable Richard Lyng
Secretary, Department of Agriculture
Fourteenth Street and Independence Ave. S.W.
Washington, DC 20250

July 29, 1987

Dear Secretary Lyng:

The 1985 Food Security Act included the implementation of several new and innovative proposals for conserving our nation's soil. The "Sod-buster" and "Swamp-buster" provisions represented important steps towards reducing the amount of highly erodible land under production.

Thus, I was disheartened to learn of the Department of Agriculture's new interim rule which would undermine Title XII of the Food Security Act by waiving the requirement to hold soil losses to the "tolerance level." I strongly urge you to rescind the implementation of the amended interim rules so that the strength of the soil conservation provisions, as proposed in the '85 Act, will be maintained.

Some have suggested that these changes in the rules were the result of pressures from Southern farmers concerned about the economic impact. I am not unsympathetic to the economic impact of any regulations, but the purpose of the law was to connect government farm subsidy payments with proper soil conservation practices. Congress expressed its concern about the economic impact by providing farmers five years to draft and five years to implement their soil conservation plans.

Congress did not intend, however, to have regulations drafted so loosely that they would allow uneven and unfair application of the law from one part of the country to another. If we allow Soil Conservation District officials to consider local economic conditions, the final result could be misguided policies which are unfair to different parts of the country. A possibility exists for some decision makers to be coerced into making decisions which provide for the greatest dollar return while neglecting soil loss.

The announcement of the interim rule change stated, "the Department recognizes that the ideal goal....would be to reduce soil loss to the soil loss tolerance level." Accepting guidelines which are less than the ideal will place a greater cost on future generations than what we face today.

It seems unreasonable to me to change the standards for this plan long before they go into effect. This program needs a chance to work before we make decisions as to whether or not the standards set will be too difficult to meet. I appreciate your consideration of this matter. I will look forward to your response.

Sincerely,

Chuck

Charles E. Grassley
United States Senator

REQUIREMENTS MAY VARY FROM STATE TO STATE

Senator GRASSLEY. But along that line, then, I would like to ask both Mr. Hertz and Mr. Scaling that under the present regulations, is there any chance that farmers from one state might enjoy less stringent soil conservation requirements than farmers from other states as it relates to the Swampbuster and Sodbuster legislation?

Mr. HERTZ. Senator Grassley, certainly, the ASCS people that are administering the programs have the same law to work with; they have the same procedure; but there are also some value judgments that are made. There are formulas that Mr. Scaling spoke of that SCS will use in making a calculation or making a determination on a wetland, and there may be a soil conservationist out there who would use a more strict or a less strict interpretation of the guidelines.

Now, I think there is a chance that there may be some inconsistency there.

Senator GRASSLEY. It might be legitimate to argue, when you have hundreds or thousands of people enforcing an existing law, that you aren't going to get an absolute. What I am interested in is the intent from USDA. Is it intended that there be any sort of leeway or less stringent enforcement or less stringent application of the rules in one section of the country versus the other?

My question comes from the fact that last summer, there was indication from the Southern States that economic considerations should be taken into account.

Mr. HERTZ. Our goal and objective is to administer our procedure as uniformly and evenly across the country as we possibly can. And I would think that if we do find discrepancies from one county to another, one state to another, that we would make an effort to correct them.

Senator GRASSLEY. Mr. Scaling, since you direct another agency, I ought to ask you the same question, and your comment?

Mr. SCALING. Well, sir, as you move from the Atlantic to the Pacific, you are going to have different areas with different criteria. I guess what I am saying is this: You are going to have, you are dealing with local people. You are dealing with local conservation districts. You are dealing with local ASC county committees, and yes, there will probably be a different interpretation in one part of the country as opposed to another part of the country.

Because quite naturally, you know, pine trees just don't grow up in North Dakota the way they do in south Louisiana, so you have got different terrains; you have got different geography; but the intent of the law is there. It will be carried out, but yes, you can't say it is going to be done exactly the same way in Michigan as it is in New Mexico. The intent is there, and it will be carried out.

Senator GRASSLEY. Well, does the statement you just made allow less stringent standards of one state than maybe in another state?

Mr. SCALING. You have got to go accordingly. What we are doing in the Soil Conservation Service is going according to our local field office

technical guide that is developed at a local level with local people and with our professional people working with them.

Senator GRASSLEY. Let me ask you this: Do you think that the——

Mr. SCALING. We are getting off the Swampbuster now and on to something else. Is that right?

Senator GRASSLEY. No; I am still talking about the same thing.

Mr. SCALING. Swampbuster?

Senator GRASSLEY. Yes.

Mr. SCALING. Sir, as I said before, we are not allowing any new land to come into production under Swampbuster. Anybody who drains any more land and plants a commodity crop on it, will be out of the program. It is just that simple. If you drain any new land, or bring any new land into production, by deepening a ditch, by digging a new ditch, then they are out of compliance.

Senator GRASSLEY. Let me ask you, and I suppose the answer to this is obvious in the sense that it has just about got to be yes from your standpoint, but I guess I want you to think in terms of if you were writing these guidelines. Was there any compromise or any abandoning of the original law's objectives to eliminate the government incentives for swampbusting and sodbusting?

Mr. SCALING. No, sir.

Senator GRASSLEY. Let me follow up along the same line. Are you confident that the current regulations will adequately meet the intentions and goals of the law?

Mr. SCALING. Yes, sir; as I said before, sir, this is something brand new, and it is going to have to be worked through, and I am confident that we can work through it to make it work.

Mr. Chairman, I have no further questions.

INADVERTENT VIOLATIONS

Senator BURDICK. Thank you. The Governor of North Dakota has constituted a Wetlands Management Committee to study wetlands issues. This committee produced several recommendations. They are as follows: SCS must give the wetland determination process a high priority to achieve a speedy determination of wetlands areas and converted wetland areas for purposes of Swampbuster provisions; in other words, a steady determination of how to operate.

As we know, there are very few farms that have been examined so far because the final regulations were not made final until September of last year.

My question is this: Farmers who inadvertently violate the Swampbuster provisions and who have not had wetland determinations made for their fields should be able to restore wetlands and not be ineligible for program benefits. What do you think about that, where there has been an innocent violation?

Mr. BRIDGE. Let me respond to that this way, Mr. Chairman. I think while we have discovered those, we have been as compassionate as we know how to be. I think the real solution in many cases has been to in-

dicate to that producer, "Don't plant a commodity on that drained wetland."

That automatically keeps it in compliance and eligible for the other programs. We certainly don't want to perpetuate that, but we do recognize the fact that there has been some of that happen.

Senator BURDICK. In other words, you would permit that farmer to make a correction?

Mr. BRIDGE. If he hasn't already planted a commodity on that piece of drained land, and usually, in many cases, we have gotten to them early enough, he has done the drainage, but he has not planted the land, whatever.

Mr. HERTZ. Senator Burdick, I believe also that in instances where a farmer realized or was told by SCS that he had committed a violation by doing any planting, he did have the option of filling the ditch back up, so to speak.

Mr. SCALING. Yes.

Mr. BRIDGE. Right.

WITHHOLDING PROGRAM PAYMENTS PENDING APPEALS

Senator BURDICK. Well, the second question the Governor asked is: Benefits should not be withheld from producers until the governing agency has proven that the wetlands have been converted. In other words, there has been a charge that there has been a violation of wetlands; why should the farmer be penalized until there has been a hearing on it of some kind? Is the charge adequate? Anyone?

Mr. HERTZ. Is he referring back to the amount of the penalty based on the amount of the violation?

Senator BURDICK. The question is a burden of proof. Does the farmer lose his benefits even before the appeal has been completed?

Mr. BRIDGE. No.

Mr. SCALING. No.

Mr. BRIDGE. I don't think so, does he?

Mr. HERTZ. No; he may not receive them timely, but he certainly wouldn't be considered to have lost them if his appeal makes a case that there was not a conversion.

Senator BURDICK. In other words, would the farmer be entitled to retain it before his rights?

Mr. HERTZ. Yes; although he might not have a check in his hand to use during that appeal process, he has not lost the benefit unless he loses the appeal.

Senator BURDICK. That is pretty important. That check is very important. Before he had a full hearing on this matter, there would be no payments?

Mr. HERTZ. Mr. Chairman, according to our procedure, if there is a report that there has been a violation, whether it be Swampbuster or any of the other programs that ASCS administers, we will not give that producer his payment until we check out the report. And if it does go into the appeal process, for the most part, based on the initial finding of a violation, a farmer is not given a payment.

Senator BURDICK. That kind of violates the principle of Anglo-Saxon law that this man is found guilty before he has had his hearing.

Mr. HERTZ. Well, it is in our procedure that until they are proven guilty, that money is not really denied them. I mean, they still are entitled to it if they are not in violation; they just don't have the money to use pending the final decision.

Senator BURDICK. The poor farmer is out there facing creditors by the dozens and yet he has to wait until a determination in this matter to get his program money?

Mr. HERTZ. I would think, Mr. Chairman, that if we have a Swampbuster violation, that is, if we find out that somebody has planted a crop on a piece of newly drained land, we would dispose of the decision timely, and that when his payment due date came, that he would know whether he would receive those funds or would not.

Senator BURDICK. I am glad to hear that, but how long in the ordinary case does the appeal process take on other matters, for example, that you have a history of?

Mr. HERTZ. Some of them are disposed of right at the county level. Some of them get entangled in legal requirements, and I am sure we have some that have taken over a year.

Senator KASTEN. This isn't Swampbuster policy; this is your overall policy; any violation on any issue, whatever it might be?

Mr. HERTZ. Yes, sir.

Senator KASTEN. It has nothing to do with Swampbuster; this is the way you run your office?

Mr. HERTZ. Yes, sir.

Senator BURDICK. But Swampbuster legislation has to be done in conformance with the general law, doesn't it?

Mr. HERTZ. Yes.

Senator BURDICK. Sure. Benefits should not be withheld from producers until the governing agency has proven that wetlands have been converted. That is more or less what we have been talking about. In other words, they shouldn't be denied program benefits until it has been established that he has violated something. You don't agree with that?

Mr. HERTZ. No, sir; I would say that if we had made no determination that there was a violation, he would be paid his benefits. Now, if there is an indication that he has, if a whistleblower or if Fish and Wildlife comes and says somebody drained a great big swamp, sure, we would withhold the benefits.

Senator BURDICK. But this farmer is without the money during this period of time that he is trying to prove his case.

Mr. HERTZ. Yes; that is right.

Senator KASTEN. The same way as anything else.

Senator BURDICK. During this period of time, after he was charged with some violation, is this farmer given the opportunity of seeing these records in the offices so he can know what this case is all about? Is he given those privileges?

Mr. HERTZ. Certainly, before that.

CERTIFICATION REQUIREMENTS

Senator BURDICK. The committee recommends that form 1026 be modified so that a producer may indicate whether or not the producer intends to drain a wetland, clean out an existing drain and whether the producer requests a wetland determination. This is what the Governor's committee recommends. What do you think about it?

Mr. HERTZ. Senator Burdick, the direction that I foresee us moving in is that if a farmer does not want to sign a 1026 or does not want to stop by the office, he can forget about it and go out and operate on his own. We have determined that converted wetlands that have drainage ditches that need maintenance periodically certainly are provided for in the law, and if a farmer feels that he can adequately maintain and not be in violation, we should let him proceed.

If there is a wetland that he wants to alter, and he comes in and files a 1026 to get a determination from Soil Conservation, I think that is the reason for the form at this point in time. If he has no intention of converting a wetland, I don't feel that he should come into the office and sign any form.

If we, through a compliance review, find that there has been some drainage, then certainly a penalty will follow. However, I don't think we need to be hassling a farmer as he goes about his normal, routine business.

Senator BURDICK. Thank you, gentlemen. Time is running on, and we will go to the next panel. If there are any further questions?

Senator KASTEN. Mr. Chairman, I would like to make just one point.

Senator BURDICK. Certainly.

PLANTING ON NEWLY DRAINED WETLANDS

Senator KASTEN. First of all, if I could have the attention of the Senator from Arkansas. I just wanted to say, in the process of going through this last series of questions, I think we have answered the question that the Senator from Arkansas had, and I think it might be a very important answer, and I just want to reemphasize it.

Mr. Hertz, you said that when a person had drained their land, whether they were draining it with the idea that they wouldn't be caught or draining it in ignorance of the law, the land has been drained, the position of some of your offices has been to rush out there and tell them, "OK, it is drained, but don't plant anything on it and that will keep you from being in violation."

Now, the goal here is to prevent land from being drained as well as to prevent new land from being put in production. Specifically, do you want to correct what you said to the chairman or are you, in fact, allowing people to drain land and then advising them not to plant, therefore keeping them from being in violation?

I can't imagine a farmer would spend money to drain land if he didn't expect to use it.

Mr. BRIDGE. Let me clarify that a little bit. No; we are not going out and finding places where people have drained land and said, "Hey, don't plant a commodity on that, because that will keep you eligible for the farm programs."

On the other hand, in those legitimate situations where people were not aware of the act, they started drainage maybe a week after the act was passed. In some of those types of settings, they have appealed the wetland determination or commenced determination to the agencies. We think it is a responsible position to reply to those people that, "Hey, if you plant a commodity, you are going to be in violation."

I would also say that I feel very strongly that there is no economic incentive under that kind of a thing to convert wetlands and that we will not see that happening on a continuing basis now that the regulations are out, the information activities are ongoing, and we have our people trained and so on.

ENFORCEMENT

Senator KASTEN. In the process of reviewing my violation numbers, which I will review with you and your offices, and we are going to reconcile the 150 violations reported by FWS versus the 83 that the North Dakota ASCS office has acknowledged receiving, we also ought to take a look at this one particular point: How much land has been drained? How many wetlands have we lost and it has been determined that the farmers responsible are not in violation just because they haven't planted on it.

That is not the idea of what we started with 3 years ago, and if we have to work around this one little glitch, we can, and we will.

The second point that you made, you were talking about 116 or was it 1,116?

Mr. SCALING. 1,640, sir.

Senator KASTEN. 1,640.

Mr. SCALING. Yes, sir.

Senator KASTEN. I think it is important for the record to point out that those are technical determinations, those are not violations. That is where your people are making a technical determination about whether an area is or is not a wetland.

That is very different from saying that you are out there working hard enforcing that law. What you are saying is that you have differences of opinion and you are in the process of resolving them. These are not violations, and you are not aggressively pursuing these issues; you are, in fact, working back and forth.

But it is not as if you are out there with all these different kinds of potential violations. That is not it. You are discussing and, in fact, negotiating the technical determinations. I just want to make one further comment. The Senator from Iowa's point, I think, is very, very important, and your comment to him was that your offices, both ASCS and SCS, desire for this to be uniform.

But the degree to which there is a difference, state by state, will be determined by the county ASCS people and how they view Sodbuster

and Swampbuster, and if you have got county ASCS people who are not enforcing the law, you are going to see people slopping over in certain areas and stronger determinations in other areas.

If that is the case, what Congress will do is to tighten up on the discretion that your local people have. We want the local people to have discretion. But that means that you have to identify those local groups that are not enforcing the letter and the spirit of the law and you have got to act with them before we have to come back and tighten up the restrictions. It is clear that Congress wants enforcement of the Sodbuster and also the Swampbuster provisions.

If you have wide deviations in different regions of the country, all we can do is to come back and take the discretion away from you that you negotiated with us to get as we were developing this law in 1985.

Thank you, Mr. Chairman.

Senator BURDICK. Senator Bumpers?

PREVENTION OF DRAINAGE

Senator BUMPERS. Mr. Chairman, if I may ask one additional question, Mr. Scaling, was it yours and Mr. Hertz' opinion that under current existing law, the way the law is right now, you do not have the authority to incorporate a regulation saying that it will be a violation to simply drain? Is that correct?

Mr. SCALING. Yes; that is correct.

Senator BUMPERS. The law says you can drain as long as you don't plant.

Mr. SCALING. Yes; you can't go beyond that with a more strict regulation saying you may not drain, period.

Senator BUMPERS. Yes; I think it is really unfortunate that the law didn't provide for a prohibition against draining.

Mr. HERTZ. I might say, too, Senator Bumpers, that many states have laws regarding water management and what can be done with wetlands, so I think even the farmer who is not participating in commodity programs might be subject to certain state laws as to what he might do with wetlands.

EFFECT OF WETLANDS ON AQUIFERS

Senator BUMPERS. Mr. Scaling, let me ask you a couple of additional questions. Does North Dakota irrigate quite a bit of its land?

Mr. HERTZ. Senator Bumpers, I am from North Dakota, so I probably should respond. Very, very little land is irrigated in North Dakota; I would guess maybe less than 2 percent.

Senator BUMPERS. Less than 2 percent?

Mr. HERTZ. Yes.

Senator BUMPERS. Is most of the irrigation from underground aquifers?

Mr. HERTZ. There is minimal irrigation along some river frontage, and there is an area in the eastern part of the state that has a water aquifer and wells.

Senator BUMPERS. Where do most of the municipal water supplies in North Dakota come from?

Mr. HERTZ. Wells.

Senator BUMPERS. Wells?

Mr. HERTZ. Yes, sir.

Senator BUMPERS. Are wetlands important to recharging the underground aquifers?

Mr. HERTZ. The wetlands are not generally in populated areas.

Senator BUMPERS. I know they are not, but aquifers run long distances. Do wetlands not recharge aquifers to some extent?

Mr. HERTZ. Yes, they do.

Senator BUMPERS. Thank you.

Thank you, Mr. Chairman.

CLOSING REMARKS

Senator BURDICK. Thank you. We have some further questions we will submit to you in writing in the interest of time here, because we have two or three other panels to follow, and thank you very much for your testimony.

Mr. HERTZ. We will be happy to respond, Mr. Chairman.

Senator KASTEN. Mr. Chairman, while they are leaving, I have some additional questions I would like to make part of the record.

Senator BURDICK. Certainly.

Senator KASTEN. I wonder if we are using the normal procedure whereby the hearing record will be open for 10 days.

Senator BURDICK. The committee record is open until the 28th. I will give you a few days.

Senator KASTEN. The record for this hearing will remain open until the 28th?

Senator BURDICK. Until the 28th of this month, and all statements should be received by that date.

Senator KASTEN. We will try to comply with that date, Mr. Chairman. Thank you.

SUBMITTED QUESTIONS

[The following questions were not asked at the hearing but were submitted for response for the record:]

Questions Submitted by Senator Burdick to Wilson Scaling, SCS

Question: I understand that USDA received thousands of comments on the interim regulations and that these comments led to changes to these regulations. Please review the main areas of controversy that arose over the draft rules to implement swampbuster, and your response to those controversies in the final rule. Outline the major issues relating to swampbuster that required the lengthy delay between the issuing of the draft rule in June 1986 and the final rule in September 1987.

Answer: Most comments received on the draft "swampbuster" rules centered on exemptions including third party drainage, commenced determinations, and minimal effect; the use of converted wetlands including drainage improvement on wetland converted prior to the act and the cropping of wetlands, 3 out of 5 years.

Concerning third party drainage most commentors suggested that any person who produces an agricultural commodity on wetlands converted after December 23, 1985 should be ineligible for program benefits regardless of who caused the conversion. USDA changed this part of the rule so that converted wetlands are presumed to have been converted by the person applying for USDA program benefits. However, if the person can show that the conversion was by an independent third party and there was no scheme or device to avoid compliance, an exemption would be given; otherwise, the person would lose eligibility for USDA program participation. If an exemption is granted under this provision, no additional conversion beyond that completed by the third party is permitted.

Many commentors suggested that the commenced exemption should be extended to drainage projects that were planned prior to December 23, 1985 and that all the area included in these drainage projects should be exempted. The Fish and Wildlife Service argued strongly that the commenced guidelines should be strengthened to prevent planned projects and all the lands therein from being determined commenced. USDA changed the rule to require only those projects that had a substantial commitment of funds obligated for construction or drainage materials purchased prior to December 23, 1985 will be considered commenced. Individuals within the project area must also show that they made a financial commitment through a specific assessment or other outlay. Requirements were added to require persons to request commenced determinations from ASCS by September 19, 1988 and to complete the commenced activity before January 1, 1995.

Many commentors indicated that mitigation be allowed under the minimal effect exemption. This would allow a wetland to be drained and replaced by an artificially created wetland elsewhere. USDA rejected these proposals because the wetland conservation provisions of the Act encourage the preservation and protection of natural wetlands, rather than the replacement of natural wetlands with artificial wetlands. Also, there will be considerable difficulty in controlling the quality of mitigated wetlands. However, on-going projects, that required mitigation as a part of the project activity were allowed to consider mitigation under the minimal effect determination only.

By far the largest concern expressed was over the use of converted wetlands. Environmental interests argued that many conversions did not completely remove or destroy all wetland characteristics and that remaining wetland values are subject to the act. USDA takes the position that if wetland was converted through the application of any of the measures described in the legal definition of conversion, the conversion was exempt from the provisions of the law. Therefore, these areas could be maintained and improved without loss of eligibility. Some wetlands such as potholes, playas and bottom land areas subject to prolonged flooding and ponding during the growing season have important wetland values remaining even after some conversion activities. These areas were excluded from the prior conversion exemption.

Additionally, many persons suggested that wetlands that were cropped 3 out of 5 years prior to December 23, 1985 should be exempted. USDA determined that conversion efforts should be assessed on the basis of practices applied that alter the water regime so that an agricultural commodity could be produced rather than cropping history.

This decision does not preclude persons from continuing to farm areas just as they did prior to December 23, 1985. Nor does this decision preclude persons from farming wetlands under natural conditions.

Question: In what situation do you expect to apply the "minimal effect exemption"?

Answer: As suggested by Congress the "minimal effect" provision will be rarely used. The conditions under which it will be used are basically two: (1) situations where the wetland is of extremely low value and it's total

destruction would result in little or no effect on public fish and wildlife values; and (2) situations where the producer's action destroys only a very small fraction of the wetland or impairs only an insignificant part of the wetland's overall function (i.e., the installation of a center pivot irrigation system that impacts a very small part of a larger wetland.) Consultation is required with Fish and Wildlife Service (FWS) for minimal effect determinations.

Question: How will mitigation, such as compensating for the loss of one wetland area by creating another, affect the use of this exemption?

Answer: Mitigation may be used as part of the minimal effect determinations as an exception rather than the rule. Mitigation may be used as a part of minimal effect determinations where: (1) the action will help restore producer eligibility; and (2) wetlands have been drained through project actions, or other limited circumstances where inadvertently an action converts wetland. In each case the minimal effect evaluation procedures would be followed. We intend that minimal effect will be rarely used.

Question: Looking at the final regulations in more detail, several changes have been suggested by producers and producer interest groups to make them more flexible while still adhering to the basic goals of the law. All have been suggested at some time during the legislative or rule making processes. I ask that you respond to each of these suggestions.

One alternative suggested is to exempt wetland areas below a certain size.

Answer: USDA feels that the Act does not provide the latitude to make exemptions based solely on size. However, the question of wetland value, to which size relates, may be considered under minimal effect.

Question: The next alternative is to exempt type 1 wetland completely from "swampbuster".

Answer: The Act contains a very specific definition and does not provide the latitude to exempt lands based on wetland types as described in Circular 39. Of the 5.2 million acres of wetland that USDA estimates have a high to medium potential for conversion to agriculture, over one-half are type I wetlands. Their exclusion from "swampbuster" would limit the effectiveness of the act to protect what may be the Nation's most important wetland area.

Question: Another suggestion is to make the penalty fit the violation so that the penalty is not the same for willing violations as it is for inadvertent violations.

Answer: The Act does not provide the latitude to adjust the penalty administratively. The Act already has limitations in terms of wetland protection without further reducing the penalty for violation. Persons who drain wetlands and subsequently plant a commodity crop on the converted wetland become ineligible for USDA program benefits for the year that the crop was planted. Noncompliance can be avoided the following years by not producing commodity crops on the converted wetland.

Question: Another alternative suggested is to exempt land that has been cropped repeatedly, perhaps 3 of the last 5 years.

Answer: Cropping history as a criterion for land that is subject to "swampbuster" has been considered extensively during the development of the final rule. The use of cropping history was rejected because, by itself it does not serve as a useful indicator for either wetland or converted wetland as those two terms are defined in the Act. Whereas cropping history is not the sole criteria for either wetland or converted wetland, it is an important consideration along with others in the process of making converted wetland determinations.

Question: How much land do you foresee will be taken out of production through swampbuster?

Answer: The swampbuster provision should not remove any land from production. The final FSA rule provides that a person may farm and maintain their wetlands in the same manner as they were farmed and maintained prior to December 23, 1985 without loss of USDA program benefits.

Question: Many of my constituents have commented that, if an area is determined to be a wetland, the farmer should be compensated for keeping that land out of production. How do you view expansion of the Water Bank Program or the Conservation Reserve Program as two possible vehicles for compensation?

Answer: We do not believe that farmers need additional compensation for keeping wetlands out of production. The "swampbuster" provision only impact wetlands that were converted after December 23, 1985 for the production of an agricultural commodity. If wetlands were farmed prior to that date, they may continue to be farmed in the future just as they were prior to the law.

We do not believe the Conservation Reserve Program should be used as a mechanism to compensate farmers for not bringing wetland into agricultural production. On the other hand if the objective is to improve the wildlife habitat of wetlands that are now farmed, a water bank program approach is a feasible approach.

Question: Some believe that concerns about swampbuster relate primarily to the way the statute was drafted, while others emphasize that they originate in program implementation. Based on your agencies' experience to date, how do you respond to these two perspectives?

Answer: We do not believe that it is appropriate for USDA to comment on the Act. We have implemented the rule in a way that we believe carries out the Act in an equitable and fair manner.

Question: I understand that some modifications have been or may be made to sodbuster so that, instead of a rigid national standard, local offices have the discretion to set the level of erosion reduction that is economically and technically feasible? Isn't there some way to do the same with swampbuster--achieve protection of wetlands without having such a profound affect on farming operations?

Answer: The level of erosion reduction required for conservation compliance is specified in the Soil Conservation Service Field Office Technical Guide (FOTG). This is specifically provided in the Act. For existing cropland, these guides allow flexibility in the level of erosion reduction based on economical and technical feasibility. However, for new highly erodible land brought into production, the final regulation states that the producer must develop and apply a conservation system which reduces erosion to a point approaching the soil loss level. The "swampbuster" provision does not provide for various levels of drainage.

Question: The Governor of North Dakota has constituted a wetlands management committee to study wetlands issues. This committee produced several recommendations. They are:

SCS must give the wetland determination process a high priority to achieve a speedy determination of wetland areas and converted wetland areas for purposes of the swampbuster provisions.

Answer: SCS is giving the wetland determination process a high priority. SCS funded a wetland determination team that should complete wetland determinations for the Red River Valley and Devils Lake area by March 1988. This team will also assist existing local field staff in making determinations in other high priority areas of the state.

Office wetland determinations, are made within 15 days of a request for a determination and within 60 days where an on-site determination is required.

Question: Farmers who inadvertently violate the swampbuster provisions and who have not had wetland determinations made for their fields, should be able to restore wetlands and not be ineligible for program benefits.

Answer: If a farmer misunderstands the information and inadvertently converts a wetland, future eligibility can possibly be maintained if a minimal effect determination is made. The farmer may also restore future eligibility by not planting an agricultural commodity on the converted wetland.

Question: Benefits should not be withheld from producers until the governing agency has proven that wetlands have been converted.

Answer: USDA benefits will not be withheld from a person until USDA determines the person has planted an agricultural commodity on a converted wetland converted after December 23, 1985. However, USDA will not make payments to a producer being investigated for a potential violation until the investigation is completed and there is a determination of no violation.

Question: The committee recommends that Form 1026 be modified so that a producer may indicate whether or not the producer intends to drain a wetland, clean out an existing drain, and whether the producer requests a wetland determination.

Answer: The present Form AD-1026 requires that the person answer the following two questions:

Will an agricultural commodity be produced on any land on farm(s) operated by the person that was a wet area but was improved, drained or modified, or converted after December 23, 1985? Or does the person plan to convert any land including wet areas for the production of an agricultural commodity this crop year or during the term of a requested USDA loan or other program benefits?

A wetland determination will be made for all persons who check "yes" to one or both of the above questions. Persons who check "no" to the questions above may still get a wetland determination by requesting that one be made. Given these existing questions on the AD-1026, we believe the Committee's concerns are addressed. However, we will provide additional guidance to our field staff to clarify how to handle maintenance of existing drainage systems.

Question: The committee recommends annual compensation to landowners for wetland protection.

Answer: The Water Bank Program is currently the only USDA program that compensates a producer for wetland protection. Presently this Program applies to only ten states and is not accepting additional contracts.

Question: Let me give both of you a hypothetical situation. A negative determination is made in the office without benefit of a site visit. The producer relies upon this determination and drains additional acres. Some time later, SCS conducts a site visit and determines that wetlands do exist on the property. Is the producer ineligible for converted wetlands after relying on an erroneous office determination?

Answer: If a person relies upon information from SCS based on an office determination which indicated that an area was not a wetland and converts the wetland for agricultural commodity production, the person will not be found ineligible for USDA benefits for that crop year. To retain eligibility for future years, the person must avoid planting an agricultural commodity on such land.

Question: At this time, do you have a sufficient number of trained staff in the field to implement swampbuster?

Answer: The Soil Conservation Service has sufficient number of staff in the field to implement the swampbuster provisions of FSA. Most of the field offices staffs have been adequately trained and the remaining will be trained within the next few months. Over the past two years, SCS has been able to make all requested wetland determinations within the time period outlined in the FSA rules. Teams of SCS specialists have been sent to assist existing personnel in those counties where a significant wetland determination workload still exists.

Question: Please outline what you believe to be adequate training necessary for staff to carry out their responsibilities under swampbuster. If lack of training in identifying wetlands is a problem, what are you doing to overcome this problem?

Answer: We do not believe lack of training for USDA personnel is a major problem. The Soil Conservation Service national headquarters staff has designed a wetland training kit that is adequate for training field office employees. This kit was presented to SCS state office staffs in November and December of 1987. The SCS state staff, in turn, has already or will soon provide training to all field office staffs involved in wetland determinations.

Question: What percentage of your staff's time in North Dakota is occupied by swampbuster?

Answer: Approximately ten percent of the staff time used implementing the 1985 Farm Bill in North Dakota is spent on swampbuster. This represents an average of 15 staff years per year. About ninety percent of the staff time devoted to the 1985 Farm Bill in North Dakota is spent on highly erodible land activities.

Question: In your opinion, is the time required for implementing swampbuster infringing on your effectiveness in implementing other provisions of the 1985 Farm Bill, and other conservation responsibilities in general?

Answer: Implementing the conservation provisions of the 1985 Farm Bill is the number one priority for all states. Through use of volunteers, private sector initiatives, increases in efficiency, and additional funds for Congress, we have been able to meet farm bill needs and maintain a level of support for other conservation activities.

Question: If you have to make choices among the various conservation responsibilities of SCS, what is your highest national priority?

Answer: The SCS top national priority is Food Security Act implementation which includes erosion control on highly erodible cropland and "sodbuster" and "swampbuster" determinations.

Question: Of the wetlands converted since passage of the 1985 Farm Bill, how many were converted by producers enrolled in the farm program?

Answer: The Department of Agriculture does not have sufficient data to accurately estimate the total wetlands converted since passage of the 1985 Farm Bill.

Question: Will North Dakota's new "no net loss wetlands law" have any effect on implementations of swampbuster in North Dakota? If not, why?

Answer: The North Dakota "no net loss wetland law" will have little if any direct effects on "swampbuster" implementation. The "no net loss wetland law" may be used as the basis for a mitigation plan that would be used in a minimal effects determination. In that regard, although the final rule does not list mitigation as an exemption, the final rule does not preclude the possibility of considering the merits of mitigation on a case by case basis in the course of making a "minimal effects" determination.

Question: What percentage of negative determinations made in the local offices were followed up by a request for a visit to the site? How many office determinations have been changed after a site visit?

Answer: USDA has not collected national data on the number of office determinations that were later followed up by a field determination. We do not know how many office determinations were changed after a site visit, but believe the number is small.

Question: How many requests for site visits have you received from persons reporting possible violations?

Answer: Persons reporting possible violations do not necessarily request site visits. Upon receiving a report of a possible violation, the USDA agencies involved determine what investigation is needed to verify if indeed a violation occurred.

Question: I have heard complaints that interpretations of the definition of wetlands vary greatly from county to county. How do you plan to correct this problem?

Answer: We are aware of some differences in interpretation of the wetland definition across state lines and in some cases, across county lines within states. We also realize that consistency in interpretation is critical to successfully implementing swampbuster. We believe that when field office staffs complete their training early this year, this problem will be minimized.

Question: Section 12.32 of the final rule requires a comparison with nearby natural area if there was a question as to whether a wetland had been converted. How many times has this section been applied in the field?

Answer: The Soil Conservation Service has not collected data on the use of comparison of converted wetland sites with nearby natural areas.

Question: What methods are used predominantly to identify wetlands? If aerial photography is one of these methods, does SCS rely at times solely upon the results of this photography?

Answer: SCS uses various sources of information to determine wetlands. Most determinations are made as office determinations that utilize ASCS color slides, National Wetland Inventory Maps, color infrared aerial photography, soil surveys, cropping history, and other information. Office determinations are made within 15 days of a request for determination.

If wetlands cannot be determined in the office due to lack of photography, maps, or other information, a field determination will be made within 60 days of the request. SCS will always make a specific site visit where the producer disagrees with an office determination.

Question: Some have suggested that implementation of swampbuster be delayed until SCS has completed the wetlands determinations. What is your view of this suggestion?

Answer: USDA does not believe implementation of the "swampbuster" should be delayed until the determinations are completed.

Question: What is the appeals process of a wetland determination and how many times have an initial negative determination been overturned on appeal?

Answer: The SCS appeals policy provides that a person who has received an adverse decision should first request that the decision be reconsidered by the local district conservationist who made the decision. If the district conservationist upholds the adverse decision, that decision can then be appealed to our state line officials: the area and state conservationist; and ultimately to the SCS Chief. Data is not collected on the number of appeals that have been overturned, but it is believed the number is relatively few.

Question: How many wetlands determinations have been made by SCS?

Answer: As of December 31, 1987, a total of 49,736 wetland determination had been made. A total of 1,399,399 acres of wetlands were found on 45,887 farms, and 63,892 acres of wetlands converted were found on 3,849 farms.

An additional number of wetland determinations were made on which neither wetlands or converted wetlands were found.

Question: How many wetland determinations are still pending?

Answer: USDA currently estimates that 1.6 million farms receive USDA program benefits. As of December 31, 1987, SCS has completed 636,547 highly erodible land and 49,736 wetland determinations. Eventually these determinations will need to be made on all participating farms.

Question: What percentage of these determinations have favored the landowner and what percentage have gone against?

Answer: The determinations made are neither for or against the farmer. SCS makes technical determinations based on site characteristics of the soil and vegetation. If wetlands exist, they are outlined and marked on a map. If wetlands were converted prior to December 23, 1985, they are marked as prior converted wetlands. In the case of the Red River Valley we are finding that over 95 percent of former wetlands now being cropped were converted prior to the act and are, therefore, not subject to the Act.

Question: Many constituents have expressed concerns about delays in receiving wetland determinations. What is the length of time between a request for a determination and completion of that determination?

Answer: In those areas of the county where farmers have requested wetland determinations at the time activities were planned, SCS has been able to make most office determination in 15 days. In cases where most of the farmers in a county request a wetland determination all at the same time, we have had to supply wetland determination teams in order to make the determinations in a timely manner. In these cases the determination will be made prior to the time crops are planted or drainage improvements are made.

Question: In your prepared statement, you indicated that the interim rule provided a quote "reasonably good basis" end quote for program implementation. What modifications were made to the interim rule and why were these modifications made?

Answer: Modifications were made in the areas that created the most controversy and comment during the comment period. These were the questions of commenced, third party drainage and previously converted wetlands. The modifications were made in an attempt to closely follow what USDA believes was the intent of the law.

QUESTIONS SUBMITTED BY SENATOR BURDICK TO MILTON HERTZ, ASCS

Question: I understand that USDA received thousands of comments on the interim regulations and that these comments led to changes to these regulations. Please review the main areas of controversy that arose over the draft rules to implement swampbuster, and your response to those controversies in the final rule. Outline the major issues relating to swampbuster that required the lengthy delay between the issuing of the draft rule in June 1986 and the final rule in September 1987.

Answer: Most comments received on the draft "swampbuster" rules centered on exemptions including third party drainage, commenced determinations, and minimal effect; the use of converted wetlands including drainage improvement on wetland converted prior to the act and the cropping of wetlands, 3 out of 5 years.

Concerning third party drainage most commenters suggested that any person who produces an agricultural commodity on wetlands converted after December 23, 1985 should be ineligible for program benefits regardless of who caused the conversion. USDA changed this part of the rule so that converted wetlands are presumed to have been converted by the person applying for USDA program benefits. However, if the person can show that the conversion was by an independent third party and there was no scheme or device to avoid compliance, an exemption would be given; otherwise, the person would lose eligibility for USDA program participation. If an exemption is granted under this provision, no additional conversion beyond that completed by the third party is permitted.

Many commenters suggested that the commenced exemption should be extended to drainage projects that were planned prior to December 23, 1985 and that all the area included in these drainage projects should be exempted. The Fish and Wildlife Service argued strongly that the commenced guidelines should be strengthened to prevent planned projects and all the lands therein from being determined commenced. USDA changed the rule to require only those projects that had a substantial commitment of funds obligated for construction or drainage materials purchased prior to December 23, 1985 will be considered commenced. Individuals within the project area must also show that they made a financial commitment through a specific assessment or other outlay. Requirements were added to require persons to request commenced determinations from ASCS by September 19, 1988 and to complete the commenced activity before January 1, 1995.

Many commenters indicated that mitigation be allowed under the minimal effect exemption. This would allow a wetland to be drained and replaced by an artificially created wetland elsewhere. USDA rejected these proposals because the wetland conservation provisions of the Act encourage the preservation and protection of natural wetlands, rather than the replacement of natural with artificial wetlands. Also there will be considerable difficulty in controlling the quality of mitigated

wetlands. However, on-going projects, that required mitigation as a part of the project activity were allowed to consider mitigation under the minimal effect determination only.

By far the largest concern expressed was over the use of converted wetlands. Environmental interests argued that many conversions did not completely remove or destroy all wetland characteristics and that remaining wetland values are subject to the act. USDA takes the position that if wetland was converted through the application of any of the measures described in the legal definition of conversion, the conversion was exempt from the provisions of the law. Therefore, these areas could be maintained and improved without loss of eligibility. Some wetlands such as potholes, playas and bottom land areas subject to prolonged flooding and ponding during the growing season have important wetland values remaining even after some conversion activities. These areas were excluded from the prior conversion exemption.

Additionally, many persons suggested that wetlands that were cropped 3 out of 5 years prior to December 23, 1985 should be exempted. USDA determined that conversion efforts should be assessed on the basis of practices applied that alter the water regime so that an agricultural commodity could be produced rather than cropping history.

This decision does not preclude persons from continuing to farm areas just as they did prior to December 23, 1985. Nor does this decision preclude persons from farming wetlands under natural conditions.

Question: In what situations do you expect to apply the "minimal effect" exemption?

Answer: As suggested by Congress the "minimal effect" provisions will be rarely used. The conditions under which it will be used are basically two: (1) situations where the wetland is of extremely low value and it's total destruction would result in little or no effect on public fish and wildlife values. (2) Situations where the producer's action destroys only a very small fraction of the wetland or impairs only an insignificant part of the wetland's overall function (i.e., the installation of a center pivot irrigation system that impacts a very small part of a larger wetland.) Consultation is required with Fish and Wildlife Service (FWS) for minimal effect determinations.

Question: How will mitigation, such as compensating for the loss of one wetland area by creating another, affect the use of this exemption?

Answer: Mitigation may be used as part of the minimal effect determinations as an exception rather than the rule. Mitigation may be used as a part of minimal effect determinations where: (1) the action will help restore producer eligibility; and (2) wetlands have been drained through project actions, or other

limited circumstances where inadvertently an action converts wetland. In each case the minimal effect evaluation procedures would be followed. We intend that minimal effect will be rarely used.

Question: Looking at the final regulations in more detail, several changes have been suggested by producers and producer interest groups to make them more flexible while still adhering to the basic goals of the law. All have been suggested at some time during the legislative or rulemaking processes. I ask that you respond to each of these suggestions.

One alternative suggested is to exempt wetland areas below a certain size.

Answer: USDA feels that the Act does not provide the latitude to make exemptions based solely on size. However, the question of wetland value, to which size related, may be considered under minimal effect.

Question: The next alternative is to exempt type 1 wetlands completely from "swampbuster".

Answer: The Act contains a very specific definition and does not provide the latitude to exempt lands based on wetland types as described in Circular 39. Of the 5.2 million acres of wetland that USDA estimates have a high to medium potential for conversion to agricultural production over one-half are type I wetlands. Their exclusion from "swampbuster" would limit the effectiveness of the act to protect what may be the Nation's most important wetland area.

Question: Another suggestion is to make the penalty fit the violation so that the penalty is not the same for willing violations as it is for inadvertent violations.

Answer: The Act does not provide the latitude to adjust the penalty administratively. The Act already has limitations in terms of wetland protection without further reducing the penalty for violation. Persons who drain wetlands and subsequently plant a commodity crop on the converted wetland become ineligible for USDA program benefits for the year that the crop was planted. Noncompliance can be avoided the following years by not producing commodity crops on the converted wetland.

Question: Another alternative suggested is to exempt land that has been cropped repeatedly, perhaps 3 of the last 5 years.

Answer: Cropping history as a criterion for land that is subject to "swampbuster" has been considered extensively during the development of the final rule. The use of cropping history was rejected because, by itself it does not serve as a useful indicator for either wetland or converted wetland as those two terms are defined in the Act.

Whereas cropping history is not the sole criteria for either wetland or converted wetland, it is an important consideration along with others in the process of making converted wetland determinations.

Question: How much land do you foresee will be taken out of production through swampbuster?

Answer: The swampbuster provision should not remove any land from production. The final FSA rule provides that a person may farm and maintain their wetlands in the same manner as they were farmed and maintained prior to December 23, 1985 without loss of USDA program benefits.

Question: Many of my constituents have commented that, if an area is determined to be a wetland, the farmer should be compensated for keeping that land out of production. How do you view expansion of the Water Bank or the Conservation Reserve Program as two possible vehicles for compensation?

Answer: We do not believe that farmers need additional compensation for keeping wetlands out of production. The "swampbuster" provision only impacts wetlands that were converted after December 23, 1985 for the production of an agricultural commodity. If wetlands were farmed prior to that date, they may continue to be farmed in the future just as they were prior to the law.

We do not believe the Water Bank Program (WBP) or the Conservation Reserve Program (CRP) should be used as mechanisms to compensate farmers for not bringing wetland into agricultural production. On the other hand if the objective is to improve the wildlife habitat of wetlands that are now farmed, a water bank program approach is a feasible approach.

The WBP could be expanded to assist wetland owners who comply with swampbuster provisions. Currently the program is small-scale and does not have sufficient funding to service a significant increase in contract demand. Because the program is designed to protect class III through VII wetlands and adjacent waterfowl nesting habitat, a major change in legislative provisions would be necessary to accommodate a large portion of "swampbuster land". Other WBP provisions that may decrease its suitability to swampbuster land include: (1) a producer must agree to maintain and in some cases enhance adjacent areas as well as the actual wetland area for 10 years, (2) the WBP requires that the wetland areas be of sufficient size to support viable nesting populations of waterfowl, and (3) many producers who farm Class I through III wetlands have relatively few acres of wetlands, or would be unwilling to place adjacent areas into permanent cover to qualify.

The Conservation Reserve Program (CRP) retires cropland from productive uses to save soil and enhance the environment. Current program provisions generally require that at least two

thirds of an enrolled field must be highly erodible cropland. Most Class IV through VII wetlands would not qualify because those areas would not likely have a cropping history. However, class I through III wetland is eligible if the land meets the cropland requirement and is highly erodible. The CRP does allow producers to install filter strips in widths of 66 to 99 feet around wetlands which are over 5 acres in size in order to protect water quality.

Question: Some believe that concerns about swampbuster relate primarily to the way the statute was drafted, while others emphasize that they originate in program implementation. Based on your agencies' experience to date, how do you respond to these two perspectives?

Answer: We do not believe that it is appropriate for USDA to comment on the Act. We have implemented the rule in a way that we believe carries out the Act in an equitable and fair manner.

Question: I understand that some modifications have been or may be made to sodbuster so that, instead of a rigid national standard, local offices have the discretion to set the level of erosion reduction that is economically and technically feasible? Isn't there some way to do the same with swampbuster--achieve protection of wetlands without having such a profound affect on farming operations?

Answer: ASCS defers to the Soil Conservation Service's expertise in this area.

Question: The Governor of North Dakota has constituted a wetlands management committee to study wetland issues. This committee produced several recommendations. They are:

SCS must give the wetland determination process a high priority to achieve a speedy determination of wetland areas and converted wetland areas for purposes of the swampbuster provisions.

Answer: ASCS defers to the Soil Conservation Service's expertise in this area.

Question: Farmers who inadvertently violate the swampbuster provisions and who have not had wetland determinations made for their fields, should be able to restore wetlands and not be ineligible for program benefits.

Answer: If a farmer inadvertently converts a wetland and a minimal effect determination is made eligibility is maintained. The farmer may restore future eligibility by not planting an agricultural commodity on converted wetland that does not meet the minimal effect criteria.

Question: Benefits should not be withheld from producers until the governing agency has proven that wetlands have been converted.

Answer: USDA benefits will not be withheld from a person until USDA determines the person has planted an agricultural commodity on a wetland converted after December 23, 1985. However, USDA will not make payments to a producer being investigated for a potential violation until the investigation is completed and there is a determination of no violation.

Question: The committee recommends that Form 1026 be modified so that a producer may indicate whether or not the producer intends to drain a wetland, clean out an existing drain, and whether the producer requests a wetland determination.

Answer: The present Form AD-1026 requires that the person answer the following two questions:

Will a agricultural commodity be produced on any land on farm(s) operated by the person that was a wet area but was improved, drained or modified, or converted after December 23, 1985? Or does the person plan to convert any land including wet areas for the production of an agricultural commodity this crop year or during the term of a requested USDA loan or other program benefits?

A wetland determination will be made for all persons who check "yes" to one or both of the above questions. Persons who check "no" to the question above may still get a wetland determination by requesting that one be made. Given these existing questions on the AD-1026, we believe the committee's concerns are addressed. However, we will provide additional guidance to our field staff to clarify how to handle maintenance of existing drainage systems.

Question: The committee recommends annual compensation to landowners for wetland protection.

Answer: The Water Bank Program is currently the only USDA program that compensates a producer for wetland protection. Presently this Program applies to only ten states and is not accepting additional contracts.

Question: I keep hearing a lot of complaints about swampbuster, but have seen very little data or facts. It would be helpful to receive specific data about the program. I would like you to respond to a series of questions, and if needed, follow up with a written response.

I understand that the department has a system to identify program violators, including a toll-free telephone number. How many calls and letters reporting violations have been received by the department, and in what manner has the department responded to these reports? How many violations have been confirmed after following up on these reports?

Answer: USDA has a toll free hotline to the Office of the Inspector General for any individual to report illegal or wasteful practices. However, ASCS has received no telephone reports or letters concerning violations relating to swampbuster.

Question: To date, how many violations have been determined nationwide and in North Dakota?

Answer: Nationwide, 5 violations have been determined with no violations being determined in North Dakota.

Question: How many possible violations are being investigated currently nationwide and in North Dakota?

Answer: Currently, 295 violations are being investigated nationwide with 14 possible violations being investigated in North Dakota.

Question: Other than receiving complaints from individuals and groups, how does ASCS plan to identify possible violations?

Answer: Swampbuster compliance is checked through a random spot checking system of all producers requesting program benefits.

Question: How will spot checks be conducted?

Answer: Fifteen percent of participating farms are spot checked using aerial slides and on site farm visits.

Question: Does ASCS have plans to modify Form 1026 along the lines suggested by the wetlands managements committee, or in any other manner?

Answer: Presently, ASCS has no plans to revise the Form AD-1026. However, additional instructions to our field offices may be needed.

Question: Please outline the appeals process under swampbuster and state how this process differs from that used for other ASCS-administered programs. Does this process provide for judicial review? Also provide an opinion whether producers should continue to receive program benefits pending the appeal.

Answer: Any person who has been denied program eligibility because of a USDA agency's determination shall have the opportunity to appeal the determination first through the agency that made the determination within 15 days after the date the adverse determination is mailed.

Appeals to ASCS shall be restricted to those provisions ASCS administers.

A producer receiving an adverse determination from ASCS may appeal first to the county ASC committee, second to the State ASC committee and the final appeal to the Deputy Administrator, State and County Operations in Washington, D.C.

The appeals process for swampbuster in ASCS is the same used for other ASCS administered programs.

USDA benefits will not be withheld from a person until USDA determines the person has planted an agricultural commodity on a wetland converted after December 23, 1985. However, USDA will not make payments to a producer being investigated for a potential violation until the investigation is completed and there is a determination of no violation. This process does not provide for judicial review.

Question: How much flexibility is there in the application of the regulations? Are county and state staff allowed to consider local conditions?

Answer: County and State ASC Committees have been given guidelines for administering the swampbuster provisions as set forth in the regulations and to make determinations within established criteria.

Question: What measures are being taken by ASCS to educate producers about their responsibilities and potential penalties under swampbuster?

Answer: County ASCS offices are informing producers about their responsibilities and potential penalties under swampbuster through newsletters, radio, TV, meetings with farmers and during any visits to the county office by the producer.

Question: Let me give both of you a hypothetical situation. A negative determination is made in the office without benefit of a site visit. The producer relies upon this determination and drains additional acres. Some time later, SCS conducts a site visit and determines that wetlands do exist on the property. Is the producer ineligible for converting wetlands after relying on an erroneous office determination?

Answer: If a person relies upon information from SCS based on an office determination which indicated that an area was not a wetland and converts the wetland for agricultural commodity production, the person will not be found ineligible for USDA benefits for that crop year. To retain eligibility for future years, the person must avoid planting an agricultural commodity on such land.

Question: You mentioned in your prepared statement that officials from ASCS, SCS and the Fish and Wildlife Service have agreed on a unified approach to administering the swampbuster provisions. What is this approach and has it been implemented?

Answer: ASCS, SCS and Fish and Wildlife Service have agreed on a unified approach in administering the swampbuster provisions relating to a commenced determination. County ASC committees have been instructed to consult with Fish and Wildlife Service in making a commenced determination.

Question: During development of the final regulations, USDA had three alternatives to choose from in defining "wetlands" for the purposes of the '85 Farm Bill. The first alternative was to include all areas that meet hydric soil watertable, ponding or flooding criteria and that may occur as wet miscellaneous areas or inclusions within a soil map unit.

The second alternative would have included map units where the map unit is not named for a hydric soil but more than one-third of the map meets hydric soil criteria. The third alternative would include map units where more than one-half of the map unit meets hydric soil criteria. Why was the first alternative chosen?

Answer: USDA selected the first alternative because many hydric soils were not included as mapping units in published soil surveys, as a result of the area being covered with water or because the area was smaller than is identified by a soil map unit .

Question: USDA identified the first alternative as the most difficult and costly to implement, and which would require the most federal outlays for training and staff workload. Furthermore, the number of producers who would become ineligible for program benefits would be highest with this alternative. Other than the fact that this alternative was the most inclusive as far as numbers of acres determined to be wetlands, why was this alternative chosen?

Answer: Some of the most important wetland in the United States would not be protected from agricultural drainage with any alternative other than the selected alternative. Almost all of the potholes in the United States would have been exempted from the wetland provisions of the FSA if any of the other alternatives had been used.

Question: The second alternative does not include very small wetlands. However, its cost in staff terms and the number of producers who would be rendered ineligible is less than the chosen alternative. The Department's analysis states that the second alternative quote "would be effective in soil erosion control and in improving water quality and in conserving fish and wildlife values. It would also have positive benefits for reducing both on-site and off-site flooding effects." End quote.

Doesn't this second alternative achieve what Congress intended without being so intrusive in the way producers may farm their land?

Answer: The second alternative would not protect some of the most important wetlands in the country. Of the alternatives evaluated, the first alternative is the most effective in soil erosion control and in improving water quality and conserving fish and wildlife values.

Question: The final rule regarding the exemption for conversion of a wetland in section 12.5(D)(4) is extremely restrictive and does not reflect legislative history. Please explain how the three criteria were developed that relate to activities of a drainage district. Have you received any response, subsequent to publication of the final rule, from the groups or individuals who commented on the interim rule? If so, what was the nature of their comments?

Answer: The three criteria regarding the exemption for conversion of a wetland in section 12.5(d) (4) of the final rule were developed after consultation with ASCS, SCS and Fish and Wildlife Service field offices. Comments from these offices were evaluated by the USDA Interagency Sodbuster/Swampbuster Subcommittee composed of representatives from the national offices of the SCS, FWS, and ASCS. No response from groups or individuals were received subsequent to publication of the final rule.

Question: In your opinion, can a single wetlands protection law, such as swampbuster, be effectively and equitably applied nationwide, given the wide variety of wetland resources and wide variety of agricultural activities?

Answer: Yes, the wetland conservation provisions of the FSA can be effectively and equitably applied nationwide to remove incentives for persons to produce agricultural commodities on converted wetlands.

Question: Will producers of certain commodities, such as wheat, be hit harder by swampbuster because of a higher rate of participation in farm programs?

Answer: No producers of a certain commodity will be hit harder by swampbuster.

The regulations state persons may continue to farm wetlands and converted wetlands under natural conditions or as they did prior to December 23, 1985.

Question: Will producers of certain commodities be more likely to convert wetlands because the economic benefit of conversion is greater than benefits received through farm programs?

Answer: Some producers are likely to convert wetlands if commodity prices increase to the extent conversion of wetlands would be profitable.

Question: As you know, salinity is a problem in North Dakota. Draining helps address this problem. In some instances, existing drains may have design problems or, through advances in technology, a better drain design may be devised. Does swampbuster preclude modification of existing drains in these situations?

Answer: A person may maintain existing drains to the level of drainage that existed prior to the Act as long as additional wetland is not brought into production. Additional wetland includes wetland on which crop production has been abandoned. Therefore, for salinity control, existing drainage systems can be maintained and/or accommodate new technology as long as the land has not been abandoned (cessation of cropping, management or maintenance for 5 consecutive years). However, expansion of drainage systems beyond their former scope and effect would require a determination of minimal effect. Additionally, not all saline seeps are wetlands, many saline seeps occur on highly erodible land.

Questions Submitted by Senator Kasten

Question: Mr. Scaling, you have outlined in your statement some of the things SCS is doing to insure more timely wetland determinations. The question I have is, why was a lot of this not done sooner? It has been over 2 years since the swampbuster law was passed.

Answer: We established priorities for making determinations to those persons who indicated that they planned to alter a wetland and plant an agricultural commodity crop on those wetlands. Now that the rules are published, and training kit developed, we will make wetland determinations for all farms on which an AD-1026 is received. In areas where swampbuster concerns are most widespread, we will organize teams to accelerate the process.

Question: Mr. Scaling, can you assure the Subcommittee that in making wetland determinations, SCS will take into account the importance of small pothole wetlands? Small muddy patches just large enough to get a tractor stuck in are one thing, but shallow, seasonally flooded wetlands are among the most important for nesting waterfowl.

Answer: Yes, I can assure the Subcommittee that we are taking into account the importance of small pothole wetlands. We are not using a size limitation. Any wetland identified on our aerial photo slides or on the Fish and Wildlife inventory maps can lead to a determination as to whether it meets the hydric soils and hydrophytic vegetation criteria in the swampbuster regulations.

Question: Finally, Mr. Hertz, I have submitted comments on a couple of occasions on the regulations governing swampbuster. As one of the originators of the swampbuster concept, I want to state clearly for the record that these regulations represent my understanding of the Congressional intent in including the law in the farm bill.

As the Administrator of the agency primarily responsible for enforcing swampbuster, do you see any places where the regulations differ from the intent of Congress?

Answer: No, we do not. In formulating the swampbuster regulations, legislative history was taken into consideration along with the specific provisions of the law.

NONDEPARTMENTAL WITNESSES

NORTH DAKOTA FARMERS UNION

STATEMENT OF ALAN BERGMAN, PRESIDENT

INTRODUCTION OF WITNESSES

Senator BURDICK. The next panel is comprised of Mr. Alan Bergman, president of the North Dakota Farmers Union; Mr. Monty Burke, president of the North Dakota Farm Bureau; Mr. Charles Frazier, director of the National Farmers Organization; and Mr. Ron Rivinius, president of the North Dakota Wheat Producers.

Welcome to the committee, gentlemen. Mr. Bergman, you are first.

Mr. BERGMAN. Thank you, Mr. Chairman, for having this important hearing on the important subject of our producer members back in North Dakota.

For the record, my name is Alan Bergman. I serve as the president of the North Dakota Farmers Union. I am a third generation farmer from North Dakota, and I farm right in the center of the prairie pothole region of the north plains at Jud, ND.

We have prefiled an organizational statement, and I ask that it be included as part of the record of this hearing. I also have with me a statement from our national organization here in Washington indicating that this is a wider problem than just North Dakota, but that statement I would also like to have inserted in the record.

Senator BURDICK. Your statement will be received for the record.

OPPOSITION TO SWAMPBUSTER PROVISION

Mr. BERGMAN. Historically, the North Dakota Farmers Union has been an advocate for conservation measures with a federally supported price reduction program. We have supported the concept that the federal farm program should be consistent with soil and water conservation objectives and that conservation programs must be consistent with farm program objectives.

It was on this basis that we supported and we understood the intent of Congress in adopting both the Sodbuster and Swampbuster provisions of the 1985 Food and Security Act. In our response to the interim regulations, we emphasized that these regulations must allow normally accepted farming practices which are consistent with sound conservation planning.

However, the final rules under the Swampbuster and the manner in which they are being implemented leaves farmers in a very precarious situation. We have no choice but to oppose the rules and the process.

First, we believe that the type I wetlands or the wet areas that have been farmed 2 out of 5 years should not be classified as wetlands for the purpose of this act. This would be consistent with the farming practices and with the minimal effect provisions. It would make both compliance and enforcement easier and more objective. We in agriculture do place economic value on those class 1 wetlands. We are fearful that normal farming practices may put us in violation if this exemption is not granted.

Second, farmers should have full information to what is to be considered wetlands in their farm unit prior to the cropping season. These wetlands should be determined and designated in their soil and water conservation plan. A producer shouldn't have to play a guessing game at the risk of farm program benefits. Nor should a producer have to declare himself potentially guilty in order to get a determination, as now is required in form 1026.

Congress must recognize that staffing of the Soil Conservation Service is simply insufficient to do the job they have been assigned. Even in the areas where determinations were supposed to be put on a fast track, our members are not getting the answers.

Third, Congress must consider due process rights of the enforcement of this provision. This means being fully informed as we have just outlined. It means that penalties are assessed after guilt has been proven and not before. It means that penalties are appropriate to the degree of the infraction, and inadvertent conversion should not be penalized the same as a willing and intentional destruction of wetlands.

In fact, the producer should have the opportunity to investigate the inadvertent noncompliance or error along with this act.

Due process also demands that the reporting of violations must be in the form of signed complaints in which the specifics of the alleged violations are outlined. Finally, we believe Congress should give greater attention to the coordinating of Swampbuster provisions with the Federal Water Bank Program and the Conservation Reserve Program. This would require increased funding for the Water Bank Program and require somewhat of a modification of the CRP.

I believe the vast majority of farmers take their soil and water stewardship responsibilities seriously, despite the fact that they do not receive full compensation for that stewardship.

The intent of Congress in adopting the Sodbuster and Swampbuster provisions was to stop massive exploitation of land resources, federal farm programs and HFA loan programs by speculators. We all hear the horror stories from various regions of the nation in which these speculators would knowingly convert thousands upon thousands of acres of range or swamp land to property. They would then proceed to use every available farm program, including disaster programs, to reap unjustifiable benefits.

The intent of Congress was to prevent such exploitation. It was not to create antagonistic regulations that presume farmers didn't give a hoot about the environment. Nor did we believe it was the intent of

Congress to give wildlife interests the right to predetermine the land use plans of producers.

We are requesting the assistance of this committee in carrying out what we believe was the intent of Congress, and we would ask for some change in the regulations and the implementation of Swampbuster provisions.

Thank you very much.

Senator BURDICK. The committee will be in recess for a few minutes.

[A brief recess was taken.]

[The statement follows:]

Statement of Alan Bergman

Good morning. My name is Alan Bergman. I am president of the North Dakota Farmers Union, a general farm organization consisting of over 32,000 North Dakota farm family members. I farm at Jud, North Dakota which is in the central part of North Dakota and right in the middle of what is known as "pothole country."

The passage of the Food Security Act of 1985 brought with it a new term "swampbusters." The final rules and regulations promulgated to administer the swampbuster provisions of this act have just been revealed to North Dakota farmers.

When the farmers of North Dakota first heard the term they thought it was to save the Everglades in Florida or the bayous in Louisiana and they supported the concept. However, when the final rules were announced and farmers learned that the definition of a wetland could include the entire Red River Valley they became very concerned.

We are here today to elicit your support in enacting a series of changes which we believe are necessary in order for the swampbuster provisions of the Food Security Act of 1985 to be more acceptable and easier for farmers to understand and comply with, without the fear of losing essential government programs. The changes we will outline are the minimum necessary in order to garner farmers' support for the continuation of a program of this nature.

The first most important issue is the determination of a wetland. We believe that Type I wetlands should be excluded from swampbuster regulations and we further believe that land cropped two out of five years should not be classified as a wetland. A Type I wetland is one that is cropped yearly. They are small depressions that are usually wet in the spring. Farmers in North Dakota have historically done tillage operations or earthwork in the fall so these areas dry more quickly. A return trip later is not required to complete seeding operations. We believe they should be exempt under the minimal effects provisions. If these are not exempt, farmers will continually be subject to penalties—even if he is farming as usual.

In order to initiate a wetland determination, a producer must answer "yes" to either Section 7 or 8 of USDA's "Highly Erodible Land And Wetland Conservation Certification" form 1026. These two sections presume a producer guilty if he answers "yes" to either question. For instance, in question 8 the language "Do you plan to convert any land including wet areas for the production of an agricultural commodity?" automatically suggests that whether the land could be classified as a wetland or not (by using the term any land) the farmer plans to violate the law. We would prefer a positive clear cut form which allows a farmer to request a wetland determination without having to indicate that he plans to convert a wetland.

Farmers are planning for their next year's production and are understandably concerned that a determination be made immediately on their farms. The severity of the penalties is enough to make any producer with wetlands on their property extremely nervous. As presently written, when a producer is reported to have converted a wetland or is under suspicion of illegally converting a wetland, all penalties--loss of loans, payments etc.--are enforced. In essence, the producer is guilty until proven innocent. We feel that the farmer should be proven guilty before penalties are assessed and that a farmer who inadvertently converts a wetland be given the opportunity to restore it. A farmer who inadvertently converts a wetland and one who intentionally destroys a wetland are treated the same under the present rules. They both lose all government programs; losses of loans, payments, etc. We ask that this "all or nothing" penalty be changed.

The reporting of possible violations by interested parties must be in the form of a signed complaint. Otherwise, farmers may be required to continually respond to and defend their actions as a result of personal differences with another citizen. This will also eliminate the potential of nuisance complaints.

We would urge Congress to consider the economic value of the wetlands. The environmental community feels that wetlands have a value in the preservation of wildlife and also to enhance the production of wildlife. The farmer feels that wetlands have a negative effect on his income. A wetland which delays planting generally reduces yield. A wetland that is not planted is still subject to property tax. Therefore, we suggest that the

swampbuster program be expanded along the lines of a conservation reserve program. Either the conservation reserve program be changed to include payments for wetlands or the water bank program be funded at an adequate level to compensate producers for their efforts in wetlands management. If the conservation reserve program were expanded, the wetlands could be "squared out" and a band of land around the wetland could be managed to ensure water quality and provide habitat.

Also in the area of requiring more funding, I would again emphasize the need for the Soil Conservation Service to "beef up" its work force in order that determinations of wetlands can be made in the most expeditious manner. The administration of the swampbuster provisions are an additional duty for the SCS and they need funding now to help complete the wetlands determinations and draft conservation plans for all farms. In order to carry out these responsibilities, SCS will need additional help.

Lastly, let me say that the charge has been made that the concerns over swampbuster are only a North Dakota issue. It has been stated that other states have had no problems with the regulations as released. We have received requests in our office from Farmers Union leadership and members in both Minnesota and South Dakota on this issue. These two states, according to news reports, were not enforcing the final swampbuster rules as strictly as North Dakota SCS officials' interpretations. We understand many determinations were verbally made and now farmers are told that the decision needs to be reversed. These new actions by their SCS have understandably generated producer concern. I believe these states are just entering the process.

Let me quickly summarize my remarks by stating that we feel that:

1. The determination of a wetland should exclude Type I wetlands and land that has been farmed two out of five years.
2. Determinations should be made as quickly as possible.
3. Penalties must be modified in order for the penalty to fit the violation.
4. Compensation must be made to the farmer for his economic loss.
5. SCS must receive "beefed up" funding.

6. Funding must be provided for an expanded CRP or for a realistic water bank system.

[CLERK'S NOTE: Following is a letter from the National Farmers Union referencing Mr. Bergman's statement.]

LETTER FROM ROBERT A. DENMAN, DIRECTOR OF LEGISLATIVE SERVICES, NATIONAL FARMERS UNION

January 26, 1988

The Honorable Quentin N. Burdick
Chairman, Subcommittee on Agriculture,
Rural Development and Related Agencies
Committee on Appropriations
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The National Farmers Union, a general farm organization with over 250,000 farm and ranch families in its membership, shares the concerns about the implementation of the swampbuster provisions of the 1985 farm bill that were outlined today by Alan Bergman, President of the North Dakota Farmers Union.

As Mr. Bergman pointed out in his testimony, this is not just a North Dakota problem. It is a national problem. In my capacity as Director of Legislative Services here in Washington, D.C., I have heard from a number of our state organizations, such as Minnesota, South Dakota, Ohio and others, about problems farmers are encountering with the implementation of the swampbuster provisions. And I anticipate we will be hearing more from our membership as they go through this process.

At the time the 1985 farm bill was written, the National Farmers Union supported the basic concept behind the swampbuster provisions of the bill. Like many other farm organizations, the National Farmers Union did not believe it was good national policy to provide federal support to encourage the conversion of wetlands like the Florida Everglades and other major wetlands into crop production. Likewise, we thought it poor policy to provide federal support to bring new additional acres of land better suited to other purposes into crop production during a time when we had massive surpluses of farm program crops. We still believe it is a good concept. What we are having problems with is the interpretation and implementation of the law.

The National Farmers Union believes that the proposed changes outlined in Mr. Bergman's testimony would solve many of the problems farmers are faced with as the law is implemented. Since we support the recommendations in his testimony, I won't repeat them in detail here since they already are part of the record.

No doubt as we go through the process, we may find some other problems which are unique to other regions as well, and we will bring them to the attention of the appropriate authorities.

With the support of Congress, many of these needed changes no doubt can be solved through the administrative process. In the event they are not, however, we may return to Congress with additional recommendations for legislation.

We want to take this opportunity to thank you for holding a hearing on this important issue and will be happy to work with you and your staff to see that these changes are brought about.

Sincerely,

Robert A. Denman
Director of Legislative
Services

NORTH DAKOTA FARM BUREAU

STATEMENT OF MONTY BURKE, PRESIDENT

Senator BURDICK. Mr. Burke.

Mr. BURKE. Thank you, Senator. My name is Monty Burke. I am president of the North Dakota Farm Bureau.

Mr. Chairman, and for the record and members of the committee, I would like to begin by thanking you for the opportunity to express our concerns in dealing with the Swampbuster provisions of the 1985 Food Security Act.

Our organization does represent 23,000 farm members and families in North Dakota, and we have, through our grassroots organization, developed a policy asking for changes, modifications or even the actual elimination of the Swampbuster provisions, and you have been provided with copies of that testimony.

So to that end, I will proceed so as to cut down on the time used so that questions could be asked. I would first like to say that the notion that there are large numbers of farmers in violation, in my honest opinion, is totally wrong. I happen to live in the center of the state; I travel over the state, and I do not see that. And the assumption that there is an enormous group of people out there waiting to drain sloughs and swamps is wrong. That just isn't so.

I might say that most of them already have been converted; many of them have, some of them have, but there isn't a big thing. Reference was made earlier on that they were not referring to the shallow mudhole where the tractor got stuck, but I want the record to show that that is not the way it is being implemented in North Dakota. That shallow mudhole is being regarded as wetlands. I don't know how effective I can be with this, but I do have photos that clearly demonstrate the problem that we have in North Dakota.

Photo number one here shows what most North Dakotans, when this bill was being proposed and so on, imagined as a normal wetland, what supported cattails, reeds and so forth. Well, when it came down to a little later—and this is photo three—it will show you quite a large area that is wet early in the spring that does possibly have a little water on it, depending on the year. That is a wetland. That was rather shocking.

But then at this time a real shocker when you find that this area here, which has two-tenths of an acre, two-tenths, if you please, is also a wetland. So the impression that they are waiting to drain big swamps or that is the problem, isn't so. It is the nuisance areas, as illustrated in the picture there. There is no distinguishment made between draining a big swamp and draining a place where you got stuck last year with your tractor.

OK, thank you, Alan.

I will move on to why there is so much confusion about the determination of a wetland. I think that is very important. Why has there been perhaps some slippage in knowing? Well, I refer to you the material that was being put out in December 1986 and had validity,

validity up until September 17, 1987, and I will read to you, as has been said before. "What are wetlands?" I asked the common person to listen to this.

Wetlands consist of soils that are covered with standing water or are saturated most of the year that support water loving plants.

Now, that certainly doesn't illustrate this point here in this photo. Two gentlemen, one by the name of Jim Benson, the other by the name of Dave Warren, with USDA, on June 25 released this document, and it bears the same thing out as to what constitutes a wetland. It is a far cry from what happened in the final determination on September 17, 1987.

Senator BURDICK. Would you care to have those documents made exhibits?

Mr. BURKE. I can, yes, sir.

Senator BURDICK. And the photographs? Can we receive the photographs as an exhibit, and we can receive the other material for the record?

Mr. BURKE. Yes, sir.

Senator BURDICK. They will be so received.

[The information follows:]

What Swampbuster Means to You

More than half of the wetlands that existed when America was first settled are gone. Wetlands are some of our most diverse and productive habitat for fish and wildlife. They help control floodwaters, recharge aquifers, and provide many recreational opportunities. Some wetlands also are potentially productive cropland. Many farmers have drained and planted them to crops, under incentives offered through various commodity support programs.

The swampbuster provision of the Food Security Act of 1985 is aimed at discouraging the conversion of wetland for agricultural purposes. If you convert wetlands to cropland use, you may lose your eligibility for certain U.S. Department of Agriculture (USDA) program benefits.

What Are Wetlands?

Wetlands consist of soils that are covered with standing water or are saturated most of the year, and that support mostly water-loving plants. The Soil Conservation Service (SCS) maintains lists of the kinds and combinations of soils and plants that define wetland areas.

Do You Have Wetlands?

Employees of the SCS determine if an area is a wetland by consulting maps or by visiting the site.

Effective Date

Swampbuster was effective December 23, 1985, the date the Food Security Act was signed. With some exceptions, if you convert a wetland area to cropland you lose eligibility for certain USDA program benefits--not just on the converted wetland area, but on all the land you farm.

USDA Programs Affected

* Price and income supports
* Crop insurance
* Farmers Home Administration loans
* Commodity Credit Corporation storage payments
* Farm storage facility loans
* Conservation Reserve Program annual payments
* Other programs under which USDA makes commodity-related payments.

Certification Requirement

When you apply for any of the USDA farm programs listed above, you must certify that you are not producing crops on land that has been converted from wetlands since December 23, 1985.

Exceptions

You are not subject to the swampbuster provision if you:

* Began the conversion of wetlands before December 23, 1985;
* Converted wetlands that had been created artificially--through irrigation, for example;
* Produced crops on wetlands that became dry through natural conditions such as drought (other restrictions may apply);
* Converted wetlands where SCS has determined that the conversion has minimal effect on wetland values.

Regaining Eligibility

In any year that you produce an agricultural commodity on a converted wetland, you are ineligible for USDA farm program benefits. To regain eligibility in any year, you must not produce crops on the converted wetland area.

If You Need Help

For more information on swampbuster or for conservation planning assistance, contact the local office of the SCS or Agricultural Stabilization and Conservation Service (ASCS). SCS conservationists can tell you if you have wetlands or highly erodible fields, and help you prepare a conservation plan. Local conservation districts approve all plans. ASCS can provide information about the effects of swampbuster and other provisions on USDA farm assistance

programs. All of the USDA staffs would like to help you continue to qualify.

This fact sheet provides general information on a key concept in the Food Security Act of 1985. Published rules and regulations are available at local USDA offices.

All USDA programs and services are available without regard to race, color, national origin, religion, sex, age, marital status, or handicap.

DECEMBER 1986

Highly Erodible Land and Wetland Conservation Provisions of the Food Security Act of 1985

Two provisions of the Food Security Act of 1985 disqualify farmers for certain U.S. Department of Agriculture programs if they produce crops on highly erodible land without following a locally approved conservation plan, or if they produce crops on converted wetlands. These are the Highly Erodible Land Conservation (Title XII, Subtitle B) and Wetland Conservation (Title XII, Subtitle C) provisions. They are the subject of USDA interim regulations published in the Federal Register of June 27, 1986, effective immediately. USDA will accept public comments on the regulations for 60 days and expects to issue final regulations later this year.

WHY THESE PROVISIONS ARE NEEDED

By allowing farmers to include crops produced on highly erodible lands and newly converted wetlands as part of their base acreage for various farm support programs, the government has in effect encouraged increased soil erosion and loss of wetlands. This situation also has contributed to commodity surpluses and depressed farm prices.

PROGRAMS COVERED

Programs covered by the regulations are USDA price and income supports, disaster payments, crop insurance, Farmers Home Administration loans, Commodity Credit Corporation storage payments, farm storage facility loans and other programs under which payments are made with respect to commodities produced by the farmer.

FARMERS AFFECTED

These regulations could affect any farmer who participates in USDA farm programs, including loan and crop insurance programs. About 80 percent of the nation's two million farmers already participate in those programs. Nearly every county in the nation has some highly erodible land or wetlands.

OPTIONS FOR FARMERS

Under the law and these regulations, farmers who have highly erodible land or newly converted wetland, or wetlands that they would like to convert, have several options:

— They can produce agricultural commodities on the highly erodible land without using an approved conservation plan, and lose their eligibility for covered USDA programs.

— Likewise, they can produce agricultural commodities on newly converted wetland and lose their eligibility.

— They can develop and apply conservation plans that will reduce excessive erosion on highly erodible cropland (conservation plans will not allow conversion of existing wetlands), and retain their eligibility for covered USDA programs.

— They may apply to enroll their highly erodible land in the Conservation Reserve if they meet the criteria for the program.

The Cooperative Extension Service provides leadership for public information and education. This will include assistance from their Extension specialists in economics, farm management,

biology and wildlife, agronomy, range conservation, and forestry.

WHEN TO ASK FOR A CONSERVATION PLAN

Farmers who think they may be farming highly erodible land, or who think they need a conservation plan for any reason, should contact the local office of the Soil Conservation Service or the local conservation district right away. This will ensure timely service and provide the farmers time to plan and apply appropriate cropping and conservation systems.

RIGHT OF APPEAL

Anyone who has been or would be denied eligibility for USDA programs under the Highly Erodible Land or Wetland Conservation provisions has the right to appeal the decision, starting with the local office of the agency that made the adverse determination. Appeals then follow normal agency appeal procedures.

HIGHLY ERODIBLE LAND CONSERVATION

This provision includes two related but distinct elements:

— "Sodbuster," which applies to land that was not cropped during the five years before the Food Security Act was enacted.

— "Conservation compliance," which applies to land that was planted to a crop at least one year during the five years 1981-85.

"TOLERABLE" SOIL EROSION RATES

Natural processes — the action of air, water, soil micro-organisms, and other factors — continually create new soil from the underlying rock. These processes can offset a small amount of erosion — up to 5 tons per acre — each year. Erosion slower than the rate of soil replacement is considered "tolerable." As SCS soil scientists prepare soil maps, they assign each soil type a soil loss tolerance value based mainly on the depth of the topsoil.

HIGHLY ERODIBLE LAND DEFINED

SCS soil conservationists determine if a soil is highly erodible according to its potential for erosion. They use factors of the Universal Soil Loss Equation and the Wind Erosion Equation to predict potential erosion caused by wind and water.

The water erosion formula relates the effects of rainfall, soil characteristics, and length and steepness of slope to the soil's tolerable erosion rate. The wind erosion formula relates wind speed and soil characteristics to the tolerable rate.

Any soil with an inherent potential to erode at eight times its tolerable erosion rate is considered highly erodible under this provision. However, the formulas do not consider crop management or conservation practices, which influence the actual erosion rate.

Conservation compliance includes a grace period for those who are not using a conservation plan, however, because of the hardships that immediate compliance would impose on farmers who have already established a cropping history. It would also place an impossible single-season workload on SCS field staffs and local conservation districts to help farmers plan and apply such measures. Therefore, farmers who are currently producing agricultural commodities on highly erodible land have until January 1, 1990, to develop and begin to actively apply a conservation plan. They have until January 1, 1995, to have the plan fully in effect.

CONSERVATION PLAN

Where a soil survey of the land is not available, producers have until two years after a survey is made to be subject to conservation compliance. Conservation plans include specific,

practical, cost-effective conservation measures that will allow farmers to produce crops without excessive erosion. They usually include such management practices as conservation tillage and contour farming, which can reduce erosion at a fairly low cost. They may also include practices such as terraces and grassed waterways that are more expensive to install. Other practices may be needed to control gully erosion on covered lands.

SCS field employees will be available to help farmers develop and apply conservation plans and will also help local conservation districts review them.

WETLAND CONSERVATION

The Wetland Conservation provision, commonly known as "swampbuster," denies eligibility for some USDA farm programs to farmers who convert wetlands in order to produce agricultural commodities. The sanction applies to all commodity crops produced by those farmers, not just those produced on converted wetlands.

WETLAND VALUES

Less than half of the wetlands that existed when America was first settled still exist. These lands are some of our most diverse and productive lands for fish and wildlife. They help control floods by temporarily storing water during storms. They trap pollutants. They help recharge aquifers. And they provide many recreational opportunities.

Wetland soils also are often highly productive when drained and planted to crops. Farmers can increase their production dramatically in many cases by draining wetlands. But in doing so, they diminish a valuable natural resource and contribute to existing surpluses.

WETLANDS DEFINED

Wetlands consist of hydric soils (soils that are covered with standing water or are saturated most of the year) that support hydrophytic (water-loving) plants. SCS uses lists of hydric soils, hydrophytic plants, and appropriate procedures that determine if an area is a wetland.

HIGHLY ERODIBLE LAND IN THE UNITED STATES (EXCLUDING ALASKA)
Source: SCS 1982 National Resources Inventory

STATE	HIGHLY ERODIBLE CROPLAND	HIGHLY ERODIBLE AGRICULTURAL LAND WITH POTENTIAL FOR CONVERSION TO CROPLAND
Alabama	1,406,800	6,150,400
Arizona	1,103,500	5,237,900
Arkansas	724,600	6,719,900
California	756,400	4,493,700
Colorado	6,124,800	8,019,100
Connecticut	69,900	373,800
Delaware	22,600	85,900
Florida	202,500	860,700
Georgia	1,083,100	5,632,800
Hawaii	130,600	460,800
Idaho	2,649,500	2,258,000
Illinois	4,108,800	2,229,300
Indiana	2,203,200	1,836,300
Iowa	8,214,800	2,704,300
Kansas	10,594,600	5,665,200
Kentucky	3,140,800	4,501,100
Louisiana	288,100	4,072,400
Maine	248,800	4,891,300
Maryland	641,500	981,900
Massachusetts	101,200	405,900
Michigan	617,800	1,902,400
Minnesota	1,636,100	1,721,700
Mississippi	1,786,100	3,443,600
Missouri	6,298,900	8,161,900
Montana	9,558,100	12,524,500
Nebraska	6,632,200	12,853,500
Nevada	75,900	759,000
New Hampshire	35,100	792,500
New Jersey	214,400	292,500
New Mexico	1,593,000	5,879,100
New York	1,994,300	4,793,900
North Carolina	1,717,200	5,527,000
North Dakota	2,271,500	3,317,500
Ohio	2,347,700	3,064,800
Oklahoma	4,699,200	9,368,700
Oregon	969,000	3,158,100
Pennsylvania	3,780,800	4,829,300
Puerto Rico	256,800	259,000
Rhode Island	3,900	123,600
South Carolina	469,700	2,388,000
South Dakota	1,703,400	6,383,100
Tennessee	2,513,100	6,001,900
Texas	13,903,000	35,589,100
Utah	615,000	1,077,600
Vermont	196,100	1,166,600
Virginia	1,612,900	5,813,200
Washington	2,396,100	3,649,100
West Virginia	605,900	3,202,800
Wisconsin	3,421,800	3,179,000
Wyoming	174,500	6,943,300
TOTAL	117,915,600	225,747,000

FORM AD 1026

Mr. BURKE. Then I would like to go further, with your indulgence, to address the form AD 1026. I think it was oversimplified to say if the farmer, if he doesn't go in and sign up, so what, and I am not taking exception to anybody.

What I am saying, though, is when you go in and sign a 1026, you are either going to sign it no or yes. And if you sign it yes, it is very parallel to the old proposition, "When do you expect to quit beating your wife?"

Because if you answer yes to 7 and 8, you are admitting guilt even if you have not committed the crime or any infraction. And I suggest we have to have forms; we have to have rules; we have to have regulations, but I suggest that it be determined that you can answer honestly with a yes or no and feel comfortable in doing so. I don't think we are asking too much for that type of situation.

[The information follows:]

Form Approved - OMB No. 0560-0004

AD-1026
(07-86)

UNITED STATES DEPARTMENT OF AGRICULTURE

HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION CERTIFICATION

816

NOTE: *The following statements are made in accordance with the Privacy Act of 1974 (5 USC 552a). The authority for requesting the information to be supplied on this form is the Food Security Act of 1985, P.L. 99-198, and regulations promulgated under the Act (7CFR Part 12). The information will be used to determine eligibility for program benefits and other financial assistance administered by USDA agencies. The information may be furnished to other USDA agencies, IRS, Department of Justice, or other State and Federal law enforcement agencies, and in response to orders of a court magistrate or administrative tribunal. Furnishing the Social Security Number is voluntary. Furnishing the other requested information is voluntary; however, failure to furnish the correct, complete information will result in a determination of ineligibility for certain program benefits and other financial assistance administered by USDA agencies. The provisions of criminal and civil fraud statutes, including 18 USC 286, 287, 371, 641, 1001; 15 USC 714m; and 31 USC 3729, may be applicable to information provided by the producer on this form.*

PART A - PRODUCER'S INTENTIONS FOR USE OF LAND

1. NAME AND ADDRESS OF PRODUCER	2. SOCIAL SECURITY NUMBER (or tax ID number)	3. CROP YEAR

FARM NUMBER(S) 4	COUNTY(IES) WHERE LOCATED 5

	Yes	No
6. During either the crop year entered in item 3 above, or the term of a requested USDA loan, will an agricultural commodity be produced on fields of the farm(s) that were not used for the production of any agricultural commodity (see instructions) or not enrolled in an USDA set-aside or diversion program during any crop year 1981 through 1985? If "yes," list the farm and field numbers.		
7. Will an agricultural commodity be produced on any land on the farm(s) listed above that was a wet area but was improved, drained, or modified, or converted after December 23, 1985? If "yes," list the farm and field numbers.		
8. Do you plan to convert any land including wet areas for the production of an agricultural commodity this year or during the term of a requested USDA loan or other program benefit? If "yes," list the farm and field numbers.		

I hereby certify that the above information is true and correct to the best of my knowledge and belief.	9. SIGNATURE OF PRODUCER	DATE

PART B - REFERRAL TO SCS

10. Based on county office information, a SCS determination is:	CHECK
a. Needed prior to the producer's certification in Part C.	
b. Needed before January 1, 1990.	

NOTE: If the producer answers "No" to Part A, items 6, 7, and 8, and the agency so agrees, the producer may complete the certification in Part C without a SCS determination. However, beginning January 1, 1990, or 2 years after a soil survey is completed, the producer must be actively applying an approved conservation plan on all highly erodible fields. Therefore, a SCS determination regarding the existence of any highly erodible fields on the farm(s) listed above is necessary before January 1, 1990.

11. DATE REFERRED TO SCS FOR DETERMINATION	12. SIGNATURE OF AGENCY REPRESENTATIVE	DATE

PART C - USE CERTIFICATION (Completed by producer)

13. As a condition of eligibility for any USDA loans or other program benefits, I hereby certify that:

a. I will not produce an agricultural commodity on highly erodible fields (except fields that, in any crop year between 1981 and 1985, were used to produce any agricultural commodity or were enrolled in a USDA set-aside or diversion program); and I will not use the proceeds of any FmHA loan, insured or guaranteed, received after December 23, 1985, for a purpose that will contribute to production of an agricultural commodity on these highly erodible fields, as determined by SCS, unless an approved conservation system has been fully applied.

b. I will not produce an agricultural commodity on converted wetlands or use proceeds from any FmHA farm loan, insured or guaranteed, received after December 23, 1985, for a purpose that will contribute to the conversion of a wetland to produce an agricultural commodity, as determined by SCS.

c. I will not convert wetlands or bring new lands into production for the purpose of producing an agricultural commodity without first consulting all USDA agencies with which (1) I have a current contract or loan agreement, insured or guaranteed, or (2) I have a crop insurance contract issued by or reinsured by the Federal Crop Insurance Corporation.

d. USDA representatives may enter upon my land for the purpose of confirming any of the above statements.

SIGNATURE OF PRODUCER	DATE

14. REMARKS

PRODUCER'S COPY

Mr. BURKE. I see my time has gone. I would like for Senator Bumpers to be here inasmuch as I do irrigate. It is not as simple as they would lead you to believe. You have problems in even covering up the wheel tracks left by an irrigation machine. It is not as simple as you would be lead to believe.

I do thank you. I would invite you people to North Dakota to see first-hand what the problem is all about, and I would be happy to yield to questions.

Senator BURDICK. Thank you.

[The statement follows:]

Statement of Monty Burke

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, I WOULD LIKE TO BEGIN MY TESTIMONY BY THANKING YOU FOR THE OPPORTUNITY TO EXPRESS OUR CONCERNS DEALING WITH THE SWAMPBUSTER PROVISIONS OF THE 1985 FOOD SECURITY ACT. OUR ORGANIZATION, NORTH DAKOTA FARM BUREAU, REPRESENTS OVER 23,000 MEMBERS IN THE STATE OF NORTH DAKOTA. THROUGH OUR GRASSROOTS STRUCTURE, OUR MEMBERSHIP HAS PASSED RESOLUTIONS ASKING FOR CHANGES, MODIFICATIONS OR ACTUAL ELIMINATION OF SWAMPBUSTER PROVISIONS.

IN COMPLYING WITH OUR ORGANIZATION'S WISHES, REPRESENTATIVES FROM NORTH DAKOTA FARM BUREAU, NORTH DAKOTA FARMERS UNION AND THE NORTH DAKOTA NATIONAL FARMERS ORGANIZATION MET TO DISCUSS AREAS IN THE SWAMPBUSTER PROVISIONS OF THE 1985 FOOD SECURITY ACT THAT ALL THREE ORGANIZATIONS AGREED COULD EITHER BE CHANGED OR MODIFIED. THESE ORGANIZATIONS MET MANY TIMES AND JOINTLY IDENTIFIED SEVERAL AREAS WHERE CHANGES OR CLARIFICATIONS COULD BE MADE. THE AREAS OF CONCERN INCLUDE DETERMINATION OF A WETLAND, PENALTIES FOR CONVERTING WETLANDS, LANGUAGE IN THE USDA'S "HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION CERTIFICATION" FORM 1026 AND COMPENSATION FOR LAND TAKEN OUT OF PRODUCTION FOR WETLAND PURPOSES.

TO BEGIN WITH, I FEEL THAT AS THE NAME OF THIS SECTION - SWAMPBUSTER - OF THE FOOD SECURITY ACT IMPLIES, THIS LEGISLATION WAS DRAFTED TO APPLY TO THE DRAINING OF SWAMPS, NOT THE NUISANCE WETAREAS THAT DOT THE GLACIAL PLAIN THROUGH THE DAKOTAS AND MINNESOTA. NUISANCE WET AREAS RETAIN WATER ONLY IN THE EARLY SPRING AND CAN BE CROPPED AT LEAST TWO OUT OF EVERY FIVE YEARS AND ARE USUALLY CROPPED EVERY YEAR. SOME OF THESE AREAS MAY NOT BE PLANTED IN THE FIRST SEEDING, BUT WILL BE RETURNED TO AND SEEDED AT A LATER DATE. THE FARMER DOES THIS TO CONTROL THE WEEDS THAT MAY DEVELOP IN THESE AREAS IF NOT PLANTED TO A CROP. IN MOST INSTANCES THESE NUISANCE WET AREAS PROVIDE LITTLE OR NO WILDLIFE BENEFIT AND ARE ONLY AN ECONOMICAL HARDSHIP TO

FARMERS. IN OUR CURRENT TRYING ECONOMICAL TIMES FARMERS NEED FLEXIBILITY FOR PROPER MANAGEMENT PROGRAMS.

OUR COALITION OF AGRICULTURAL GROUPS FELT THAT BY CHANGING THE DETERMINATION OF A WETLAND FROM; 1) LAND BASED ON SOIL TYPES AND VEGETATIVE GROWTH, TO; 2) LAND THAT IS CROPPED AT LEAST TWO OUT OF FIVE YEARS OR TYPE I WETLANDS AS DESCRIBED IN U.S. DEPARTMENT OF THE INTERIOR U.S. FISH AND WILDLIFE CIRCULAR 39, 1971, THAT THIS WOULD ALLEVIATE MUCH OF THE PROBLEM. BY CHANGING THIS METHOD WE WOULD: 1) ELIMINATE A HUMAN DETERMINATION FACTOR THAT CAN CAUSE INTERPRETATION VARIANCES, 2) ALLOW FARMERS MORE FLEXIBILITY IN THEIR OPERATIONS BY PROVIDING TO THEM AN EASY WAY TO DETERMINE WETLANDS, AND 3) EASE THE WORK LOAD FOR GOVERNMENT AGENCIES.

THE NEXT AREA OUR COALITION ADDRESSED IS THE PENALTIES FOR CONVERTING A WETLAND, AS DETERMINED IN THE SWAMPBUSTER PROVISIONS. THE PENALTIES OF LOSS OF GOVERNMENT PAYMENTS, PRICE AND INCOME SUPPORTS, DISASTER PAYMENTS, CROP INSURANCE, FARMERS HOME ADMINISTRATION LOANS AND OTHER PROGRAM BENEFITS, USE A COERCIVE APPROACH TO GET A FARMER TO COMPLY. THIS INFRINGES ON A FARMER'S RIGHTS TO OPERATE THE FARM IN THE BEST MANNER FOR HIM OR HER AND IS A DIRECT CHANGE IN POLICY FROM THE PAST THAT STRESSED COMPENSATION FOR VOLUNTARY PARTICIPATION.

THE PUNISHMENT OR PENALTIES FOR CONVERTING A WETLAND ARE ENFORCED IN SUCH A WAY AS TO PRESUME GUILT BEFORE THERE IS ACTUAL PROOF OF CONVERSION. IN OTHER WORDS, IF A FARMER IS SUSPECTED OR REPORTED BY SOME THIRD PARTY OF CONVERTING A WETLAND, EVEN BEFORE IT HAS BEEN PROVEN, THAT FARMER IS PRESUMED GUILTY, WHICH MEANS THAT ALL PROGRAM PAYMENTS ARE STOPPED. THIS IS A 180° TURN FROM PRESENT PHILOSOPHY. PENALTIES ARE ALSO EITHER ALL OR NOTHING: THE FARMER LOSES ALL PAYMENTS, NOT A PART OR A FRACTION. THERE IS NO PROVISION FOR THE FARMER THAT INADVERTENTLY CONVERTS AN AREA DETERMINED TO BE A WETLAND, EITHER. THESE PROBLEMS COULD BE ALLEVIATED BY FIRST PROVIDING THAT THE GOVERNMENT AGENCY PROVE THERE HAS BEEN A VIOLATION AND SECOND, INCLUDING

A CLAUSE TO ALLOW A PRODUCER TO PLUG A WETLAND THAT HAS BEEN INADVERTENTLY CONVERTED.

THE THIRD AREA THAT THE COALITION FELT COULD USE IMPROVEMENT IS IN THE USDA'S "HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION CERTIFICATION", FORM 1026. IN THIS FORM THERE ARE TWO SECTIONS, 7 AND 8, THAT WE FEEL IF A FARMER ANSWERS "YES" TO, AUTOMATICALLY PRESUMES GUILT EVEN IF THE LAND IN QUESTION DOES NOT QUALIFY AS A WETLAND. THE QUESTION, AS STATED, IS BROAD AND FAR REACHING. THE PHRASE "DO YOU PLAN TO CONVERT ANY LAND INCLUDING WET AREAS FOR THE PRODUCTION OF AN AGRICULTURAL COMMODITY. . ." IS EXTREMELY NEGATIVE AND PROVIDES FARMERS WITH NO CLEAR CUT DEFINITION TO WET AREAS.

IN A NEWS RELEASE DATED JANUARY 5, 1988, RELEASED BY THE ASCS OFFICE, A FARMER THAT DOES NOT CERTIFY WITH THIS FORM 1026 WILL NOT BE ELIGIBLE FOR PROGRAM BENEFITS. THIS MEANS THAT A FARMER MUST CERTIFY WITH THE FORM, BUT THEY DON'T KNOW IF THE WET AREA THEY ARE CONVERTING IS CONSIDERED A WETLAND. THE RELEASE GOES ON TO STATE THAT THERE ARE "BLANK" NUMBER OF AREAS IN EACH COUNTY THAT THEY SAY ARE WETLANDS AND HAVE A MEDIUM TO HIGH POTENTIAL FOR CONVERSION. I ASK THE QUESTION, DOES A HIGH POTENTIAL FOR CONVERSION MEAN A WET AREA THAT IS PRESENTLY BEING FARMED?

WE FEEL THAT THE FORM NEEDS TO BE REWRITTEN TO ALLOW THE FARMER TO KNOW IMMEDIATELY IF THE WET AREA IS TRULY CLASSIFIED AS A WETLAND. I LIKE TO KNOW EXACTLY WHAT I'M SIGNING. THAT'S JUST GOOD BUSINESS SENSE. WHEN I SIGN THE FORM NOW, AS WRITTEN, IT MAY BE MONTHS BEFORE I KNOW IF I COMMITTED A VIOLATION, AT WHICH TIME I STILL LOSE MY GOVERNMENT PAYMENTS.

THE FOURTH AREA THE COALITION EXAMINED WOULD BE A NEW AREA TO THE SWAMPBUSTER PROVISION THAT WOULD PROVIDE FOR COMPENSATION PARTICIPATION AS OPPOSED TO COERCIVE PARTICIPATION. THIS PROGRAM COULD BE PATTERNED AFTER THE CONSERVATION RESERVE PROGRAM OR THE FEDERAL WATERBANK PROGRAM. THE PROGRAM WOULD ALLOW THE FARMER TO ENTER A WETLAND INTO A RESERVE TYPE PROGRAM WITH YEARLY

PAYMENTS FOR COMPENSATION. WITH THE PROGRAM YOU COULD TAKE A WETLAND IN THE CORNER OF A FIELD, ALLOW FOR ADDITIONAL ACRES OF SURROUNDING LAND SO THE FARMER CAN SQUARE OFF AN AREA, AND PROVIDE COMPENSATION TO THE FARMER. THIS TYPE OF PROGRAM WOULD ALLOW THE FARMER AND THE WILDLIFE GROUPS TO WORK TOGETHER TO BENEFIT BOTH THE WILDLIFE AND THE FARMER. IT WOULD TAKE LAND OUT OF PRODUCTION, YET ALLOW FARMERS TO MANAGE THEIR LAND IN A MANNER THEY FEEL WOULD BE THE MOST ECONOMICALLY FEASIBLE FOR THEM.

IN CLOSING I WOULD LIKE TO SHARE A FEW COMMENTS FROM A FARMER IN THE JAMESTOWN AREA WHO WROTE TO ME WITH HIS CONCERNS ABOUT SWAMPBUSTER. THIS GENTLEMAN HAS SERVED ON COUNTY ASCS COMMITTEES AND IS FAMILIAR WITH PAST AND PRESENT AGRICULTURAL PROGRAMS, HAS RECEIVED CONSERVATION AWARDS AND HAS EVEN PARTICIPATED IN WILDLIFE PRESERVATION PROGRAMS. THIS FARMER STATES IN HIS LETTER AND I QUOTE, "I VIEW SWAMPBUSTER NOT ONLY AS UNDULY AND IMPROPERLY RESTRICTIVE BUT ALSO AS SETTING A VERY BAD PRECEDENT FROM THE STANDPOINT OF APPROACH AND PHILOSOPHY. PAST AGRICULTURAL CONSERVATION PROGRAMS USED COMPENSATION TO ENCOURAGE VOLUNTARY PARTICIPATION WHEREAS SWAMPBUSTER USES COERCION." THE GENTLEMAN GOES ON TO SAY THAT CURRENT LEGISLATION INFRINGES ON HIS AS WELL AS OTHER FARMERS' RIGHTS TO FARM. TO GO FURTHER, IT ALLOWS WILDLIFE, ENVIRONMENTAL AND SPECIAL INTEREST GROUPS TO INJECT THEIR PHILOSOPHY INTO LAND MANAGEMENT. THIS ALL COMES FROM A MAN WHO HAS BEEN AWARDED FOR HIS CONSERVATION EFFORTS, AND ACTIVELY SUPPORTS GOOD WILDLIFE MANAGEMENT AND HABITAT.

SWAMPBUSTER RULES AND REGULATIONS AS CURRENTLY WRITTEN ARE DRIVING A WEDGE BETWEEN OUR FARMERS, GOVERNMENT AGENCIES, WILDLIFE GROUPS AND ENVRONMENTALISTS. FARMERS AS A WHOLE ARE BOTH CONSERVATION AND WILDLIFE SUPPORTIVE. FOR YEARS, OUR ORGANIZATION HAS SUPPORTED IMPROVING CONSERVATION METHODS AND HAS ACTIVELY WORKED TO DEVELOP BETTER CONSERVATION PRACTICES. BUT WE ALSO SINCERELY BELIEVE THAT EVERY MAN IS ENTITLED TO OWN PROPERTY, EARN MONEY HONESTLY, SAVE, INVEST AND SPEND THAT MONEY AS HE OR SHE CHOOSES AND HAVE CERTAIN PROPERTY RIGHTS. THESE RIGHTS ARE PROVIDED FOR IN THE CONSTITUTION AND ARE GRANTED TO ALL MEN.

Swampbuster:
Farmer Concerns

Proposed by: North Dakota Farmers Union,
North Dakota Farm Bureau and
the North Dakota National Farmers Organization

The following position paper addresses the concerns of North Dakota farmers in regard to Swampbuster provisions of the 1985 Food Security Act, as expressed by our three organizations.

To address our farmers' concerns, North Dakota Farmers Union, North Dakota Farm Bureau and the North Dakota National Farmers Organization have collectively identified several areas in which we feel revisions and clarifications need to be made in the Swampbuster provisions. We ask that these modifications be made to the satisfaction of all parties involved.

Areas of Concern:

1) Determination of a wetland:

The determination of a wetland based on soil types and vegetative growth, is too broad. Even with the system developed in the rules, there is a human determination factor that can cause interpretation variances, and henceforth producer confusion. In addition, the present wetlands definition necessitates a determination by the SCS and/or ASCS. Farmers are not able to determine for themselves what is and what is not considered a wetland. This only creates more work for the governmental agencies and increases the possibility of farmers inadvertently violating the law.

We propose wetland determinations exclude:

1) Land cropped two out of five years.
2) Type I wetlands.

2) Penalties for converting wetlands:

Presently, when a producer is reported to have converted a wetland or is under suspicion of illegally converting a wetland, all penalties -- loss of loans, payments, etc. -- are enforced. In essence, the producer is guilty until proven innocent. Also, there are no varying degrees of punishment to a violation. It is all or nothing. A farmer that inadvertently convertes a wetland and one that intentionally destroys a wetland are treated the same.

We propose the following revisions in the law: First of all, we feel that the governing agency must first prove there has been conversion of a wetland before penalties are invoked. Secondly, there should be a clause in the penalties section that would allow the producer to make amends for inadvertently converting a wetland. (An example of this would be allowing the producer to plug a converted wetland drain or level the ditch to specifications, without loss of payments.)

We feel that the reporting of possible violations be in the form of a signed complaint. This will eliminate the potential of nuisance complaints that may arise as a result of producers' personal differences being vented through this avenue.

3) A revision in the USDA's "Highly Erodible Land and Wetland Conservation Certification" form 1026:

We feel that two sections of this form -- sections 7 and 8 -- presume a producer's guilt if he answers yes to either question. For instance, in question 8 the language, "Do you plan to convert any land including wet areas for the production of an agricultural commodity..." automatically suggests that whether the land could be classified as a wetland or not, (by using the term "any land") that the farmer will be in violation of a law if he answers yes to the question. Both sections are vague in the use of the language "wet area".

The form is extremely negative and offers farmers no help in requesting determination of wetland acreage on his land. We prefer a positive, clear-cut approach that indicates how a farmer can determine if the land in question is or is not a wetland, as well as a better identification of drains.

Finally, we feel the final determination of what land is truly a wetland should be determined by the ASCS County Committee, not by the SCS. Right now, farmers are being sent back and forth between the two agencies, and at the present time neither one is willing to give a definite determination so the farmer can continue his noraml farming practices without undue concern.

Overall, we feel the form should allow the farmer to know immediately where he stands in regard to possible violations, instead of finding out months later he is in violation.

4) Compensation

As the Swampbuster law is now written, farmers are restricted from exercising their managerial rights to the land.

We propose that when an area is determined to be a wetland, ineligible to be drained, that "wetland" area and enough surrounding land to square the area into a rectangular shape should be eligible to participate in the Conservation Reserve Program or a similar program, at rates commensurate with other land in that area.

National Farmers Organization

STATEMENT OF CHARLES FRAZIER, DIRECTOR

Senator Burdick. Mr. Frazier.

Mr. Frazier. Good morning, Mr. Chairman.

Senator Burdick. Good morning to you.

Mr. Frazier. I am here because our state president, Milton Champus, found it was just impossible for him to come to town. So having discussed with him and having the advice of all these men who have been working together in North Dakota on this problem, I should try just

briefly to summarize two or three points of concern. They are covered in my testimony, but I want to relate to some of the answers given by the earlier panel, the gentlemen from the Department.

First, it seems to me most important that we recognize, as Mr. Burke just indicated, that this form AD 1026 literally can mislead some of our good producers and, in effect, put them in jeopardy on substantial payments and other program benefits.

I think I could do this best by referring to an example set forth in my statement. As is customary on many farms, the areas with which we are concerned, one of our members used his own farm equipment in the fall of 1987 simply to clean out crop trash and sediment in a small ditch that moves excess surface water from the middle of a good field. He has farmed this land consistently for a number of years.

If the same action had occurred prior to the effective date of the 1985 act, no question would have arisen; it wouldn't have been thought of as destroying wetlands.

However, if he honestly reports now that he cleaned the ditch in the fall of 1987, as is implied on this form 1026, he may be charged with draining what is now labeled as class 1 wetlands and subjected to loss of program benefits. In his case, that will amount to about $25,000. And he is talking about a little wet spot of less than 1 acre. Since that land had been farmed for a number of years, it now should either be farmed without penalty, or some provision should be made to compensate the producer for taking the land out of production.

Without drawing on the other details in my testimony, I believe this example rather clearly denotes the problem facing your committee, and I refer to some of the answers that the gentleman from USDA put into the record a little bit earlier. I could agree with the Administrator who said, "Give us some time. If we make a mistake or two, we can correct them."

I believe they are sincere, and our members would normally trust them in administering these programs. But if you look closely at what was put in the record a little earlier, one of the good men said, "You can't bring any more land into production.You can continue to use land farmed in the past." That is in direct conflict with the implications of form 1026. You just go out and clean up some trash and let temporary spring water drain off the field if that land is classified as wetland under their current published regulations.

The matter is complicated a little further when they say that if a farmer determined that he does not have a problem or intention to convert a wetland, "Don't come in; don't sign a 1026."

Suppose a number of our people followed that advice and then folks, perhaps of good intention, come along later and said, "Hey, this man drained some wetland. I saw him out there with a tractor and a scaper, and he opened up that ditch."

Then on a post-review basis, that producer is placed in jeopardy on all of his program benefits. So I think you can summarize it very quickly this way: Our people believe that there should be some

modification of the penalty now exacted under the law. In other words, it should be brought down to a penalty commensurate with the violation, if you please, some deduction or a privilege of substituting other land for land that has been drained or perhaps some delay in invoking a penalty from one year to another so that these cases that are challenged may be settled in judgment by the ASC County Committee at the local level without completely knocking a man out of the programs for a year's time.

I think that is the crux of the whole thing. It is a matter of the gratification of good judgment, but above all, there is a matter of timing involved. The signup period will start in the middle of February and run for just 60 days. It seems to me that it will be nearly impossible to get all of these decisions clearly made before producers complete their signup and make their commitment on farming on those fields.

PREPARED STATEMENT

So we stand ready to work with you and help you in any manner we can. We would be glad to consult further if that is helpful. Thank you, sir.

Senator BURDICK. Thank you very much.

[The statement follows:]

STATEMENT OF CHARLES L. FRAZIER

SWAMPBUSTER PROVISION OF THE 1985 FOOD SECURITY ACT

Mr. Chairman and members of the Subcommittee, our members of the National Farmers Organization in North Dakota appreciate your time and attention to the problems relating to implementation of the swampbuster provision of the 1985 Farm Act. As head of the Washington office for National Farmers Organization, I appear today to reflect their opinions and advice. Some questions also have been raised in surrounding States.

The Chairman is familiar with earlier discussions and efforts of the North Dakota State presidents of National Farmers Union, American Farm Bureau Federation and National Farmers Organization to correlate their thinking. Let me try to reassure all who are concerned with the problem on this committee and the USDA personnel having responsibility for administering the swampbuster provision, as well as those organizations who are sincerely concerned about the environment and safeguarding of a proper habitat for migratory birds. The importance of potholes and related habitat as breeding and feeding areas for migratory birds has been considered by those administering farm programs a number of times over the last 30 years. We do not seek to defeat the purpose of the swampbuster provision nor are we anti-conservation in our viewpoints. Our farmer members are keenly aware of the water quality issues generated in recent years as a result of fence-to-fence farming and heavy applications of various fertilizers and chemicals. We want to help develop a satisfactory resolution of the administrative confusion that has developed rapidly in recent weeks.

It now appears that the new provision in the 1985 Act is being implemented with little prior explanation to producers. The penalty for unintentional violation is severe and unjustified. Consequently, we seek clarification and possibly some revision of the regulations designed to carry out the swampbuster provision.

The four major elements of the problem illustrate the need for administrative action:

> We believe the Form AD-1026 is faulty because it calls upon the producer to make firm statements or commitments

with respect to "any land" without knowing the spots on the farm that may be questioned by the SCS technicians at a later date.

> Some land that has been regularly farmed is now about to be designated as "wet land."

> There is no provision for a partial penalty nor for correction of an unintentional conversion of land that later may be ruled to be wetlands.

> The importance of the determinations, the schedule dictated by the farm program sign-up (February 16 through April 15) and the necessary seasonal field work makes it nearly impossible for producers to discuss problems arising on each farm with the agency authorities and know where they stand before the start of field operations for the 1988 crop.

In the interest of saving your time and avoiding duplication in our statements, I will not repeat observations offered by other members of the panel. However, let me give you a specific example that illustrates the dilemma confronting a number of farmers at this time. As is customary on many farms in the areas with which we are concerned, one of our members used his own farm equipment in the Fall of 1987 simply to clean out the crop trash and sediment in a small ditch that moves excess surface water from the middle of a good field. He has farmed this land consistently for years.

If the same action had occurred prior to the effective date of the 1985 Act, no question would have arisen. However, if he honestly reports now that he cleaned the ditch in the Fall of 1987, he may be charged with draining what is now labeled as Class I wetlands and subjected to a loss of program benefits equivalent to about $25,000.

Since that land has been farmed for a number of years, it either should now be farmed without penalty or some provision should be made to compensate the producer for taking the land out of production.

We do not believe that the Congress nor those sponsoring this provision in the 1985 Act meant to force the conversion of land regularly farmed in recent years to water fowl use without due

compensation. After all, the owner is paying taxes on that ground. He should not be required to produce ducks at his own expense just to please some hunters farther South in the Mississippi flyway next Winter.

It is suggested that two courses of action be taken by this committee. For the 1988 farming season, the Chairman should undertake to arrange an informal agreement with USDA personnel and the sponsors of the swampbuster provision that:

1) Type I wetlands and land regularly farmed at least two out of the last five years be exempt from wetland designation;

2) Producer would not be penalized for unintentional conversion when he had not been advised of designation prior to his action on the land; and

3) Procedure would be arranged for an appeal in the ASCS of the SCS technician's designation.

For long-term consideration, we propose that:

1) Class I land be made eligible for entry into the CR Program at reasonable rates of payment; and

2) Producers be authorized to designate open farmland for permanent commitment to wildlife use in exchange for clearance to farm land now designated as wetland in an acre for acre trade. Subject to approval of the technicians, the provision would accommodate both the producer and the wildlife program in many instances.

Mr. Chairman, if we may be helpful in resolving these problems, please call on us. We have appreciated your long and steadfast efforts to serve in the best interests of the people of North Dakota.

North Dakota Wheat Producers

STATEMENT OF RON RIVINIUS, PRESIDENT

Senator Burdick. Mr. Rivinius.

Mr. Rivinius. Thank you, Senator. I am Ron Rivinius, president of the North Dakota Wheat Producers, an organization representing the most efficient grain producers in the world. Due, in great part, to the policy that you Senators can accept credit for, the 1985 farm bill is working. By bringing down the surpluses and improving the exports, the agricultural profitability picture is much improved. We are not out of the woods completely, because it is the macroeconomic and political policies that can either hurt us or help us increase our markets now.

So if we are enjoying a cautious optimism in production and markets, why are we griping about the rest of the 1985 farm bill? Is it that of compliance in our conservation practices and land use?

If the original commonsense approach upon which we thought Swampbuster and Sodbuster were based had been reflected in the final rules, we would not need this hearing. Farmers are good stewards of their land when not forced by wrong-headed national policy or the "plunger mentality" of the 1970's to bring fragile land into production.

In times of surplus commodities and cheap food, it is easy to become casual about taking land out of production and precluding additional land coming in. Government does have a responsibility to the taxpayer to ensure that the cycle which led to the surplus grains and high government costs not repeat itself.

However, the legitimate effort to keep fragile grasslands from being plowed up or swamps, with their near extinct species, from being drained by those who would produce surplus program crops has been turned into a bureaucratic nightmare. We suddenly cannot make a judgment call without asking "Big Brother."

We as farmers dare not use standard operating practice to deal with Mother Nature's yearly variables without consulting the Soil Conservation Service. I can understand checking before we drain land which has never been farmed before, but let's get realistic about what is humanly achievable by a government agency and what is practical for a farmer.

Our recommendation is that much of North Dakota, especially the Red River Valley, be considered preconverted wetlands unless otherwise identified, to alleviate the ridiculous amount of mapping and time-consuming bureaucratic redtape in which we are now caught.

From all we have heard from the administration at USDA, ASCS, and SCS top level staff, local SCS personnel have the decisionmaking authority for Swampbuster and Sodbuster. We have been assured and reassured often enough that we do believe this to be the case.

However convinced we are, the local personnel often seem so cautious about opening themselves for criticism from their superiors and by the local farmers that they freeze like critters caught in the beam of a car's headlights.

They, more often than not, will refuse to exercise the latitude allowed for peculiar regional differences. Somehow, the message we hear from top level administrators regarding flexibility in application of the rules and regulations has got to get through to these local SCS officials.

Additionally, those same officials who are given the responsibility for determining compliance also deal with the appeals process. North Dakota Wheat Producers feel that farmers need to have the same process of appeal under Swampbuster as they have under other programs: A hearing by local and state committees made up of locally elected representatives, not a bureaucratic process removed from unique local and seasonal circumstances. These boards need to be empowered by actually having authority in deed as well as word to rule on plans and appeals.

I appreciate this opportunity to have shared the concensus of the concerns of the North Dakota Wheat Producers who gathered at four regional meetings held the first week in November. The meetings were held in Scranton, which is in the extreme southwest corner where Sodbuster is a problem; Stanley, in the northwest; Devils Lake in the north central, where Swampbuster is fighting words; and in Jamestown in the south central region of the potholes.

We had a good cross section of farmers in attendance, and all agree that Swampbuster is the worst example of the government taking a perfectly simple intent and turning it into a bad law and in impossible bureaucratic redtape. We also agree with the positions expressed by the coalition of Farm Bureau, Farmers Union and NFO and those voiced by the North Dakota Conservation Districts to allow flexibility and the benefit of the doubt before program benefits are denied to farmers.

I thank you, Mr. Chairman.

Senator BURDICK. Thank you.

[The statement follows:]

STATEMENT OF RON RIVINIUS

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In times of surplus commodities and cheap food it is easy to become casual about taking land out of production and precluding additional land coming in. Government does have a responsibility to the taxpayer to insure that the cycle which led to surplus grains and high government costs not repeat itself. However, the legitimate effort to keep fragile grasslands from being plowed up or swamps with near extinct species from being drained by those who would produce surplus program crops has been turned into a bureaucratic nightmare. We suddenly cannot make a judgment call without asking "Big Brother".

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enough that we do believe this to be the case. However convinced we are, the local personnel often seem so cautious about opening themselves for criticism from their superiors and by the local farmers, that they freeze like critters caught in the beam of a cars headlights.

They more often than not will refuse to exercise the latitude allowed for peculiar regional differences. Somehow the message we hear from top level administrators regarding flexibility in application of the rules and regulations has got to get through to these local SCS officials.

Additionally those same officials who are given the responsibility for determining compliance also deal with the appeals process. North Dakota Wheat Producers feels that farmers need to have the same process of appeal under swampbuster as that they have under other programs -- a hearing by local and state committees made up of locally elected representatives -- not a bureaucratic process removed from unique local and seasonal circumstances. These boards need to be empowered by actually having authority in deed as well as word to rule on plans and appeals.

I appreciate this opportunity to share the consensus of concerns North Dakota Wheat Producers gathered at four regional meetings held the first week of November. The meetings were held in Scranton, in the extreme southwestern corner of North Dakota; Stanley, in the northwest; Devils Lake where "swampbuster" is fighting words; and Jamestown in the south central region. We had a good cross section of farmers in attendance, who all agree that swampbuster is the worst example of government taking a perfectly simple intent and turning it into bad law and impossible bureaucratic red tape. We also agree with the positions expressed by the coalition of Farm Bureau, Farmers Union, NFO and those voiced by the N.D. Conservation Districts to allow flexibility and the benefit of the doubt before program benefits are denied to farmers.

IMPLEMENTATION OF SWAMPBUSTER

Senator BURDICK. I am going to ask these questions of the panel, and you can respond in any order you wish. How would you characterize the Department's effort to implement the Swampbuster to date? I think, Mr. Rivinius, you more or less answered that question.

Mr. RIVINIUS. When you sign the 1026, you are asking for a determination of whether it is a wetland or if it isn't a wetland. We, back in North Dakota, don't see any way that that is going to be completed by the time the signup time is over with. How are the farmers supposed to react at this time? Can we seed this or can't we seed it? Can we grade it? I shouldn't say seed it, but can you grade it? Sometimes in the spring it will be open and we can grade it. If they do not, they might be out of compliance, and we just don't see with the mountain of paperwork that has to be done that that can be accomplished.

Senator BURDICK. Do you believe that the USDA is adequately staffed and that the staff is adequately trained to implement these provisions within the time prescribed that we heard of earlier here today?

Mr. RIVINIUS. No, I don't, and that is why I feel that there should be a determination made on prior conversion, which had been talked about earlier; that they would designate some of those areas just as prior conversion. Then the farmer would not have to worry about being out of compliance. They could still check, as far as new drainage is concerned, and that is a concern.

Most of the land that hasn't been drained has been ditched and whatever. It is just that if they want to go out and clean it out and haven't had the soil conservation, they don't have their maps designed or they haven't proved to the SCS that they have already done that prior to 1985, if they don't have those things finished, it can be called a wetland.

Senator BURDICK. You were in the room today when you heard the others testify, I am sure.

Mr. RIVINIUS. Right.

Senator BURDICK. In Scranton, it is understood that the regulations were made final until September of this year. So relatively few farmers are involved at this juncture. It may take a couple of years before you can go over the whole gamut of this problem. Do you agree with that?

Mr. BURKE. Senator? Yes; I would like to address that.

Senator BURDICK. You may.

Mr. BURKE. In response to whether or not the USDA and the SCS or the ASCS and the SCS is adequately funded or have got the personnel to do the job, not in the timeframe that is presently upon us. But I will give them a lot of credit for doing the best they can with the resources they have, and I have found the Soil Conservation Service and the ASCS very cooperative in the things they had to deal with.

But you are absolutely right in saying that they really didn't know what they were dealing with until September 17, but neither did anyone else. It makes it difficult, and in this very brief period of time, and I am certain that it is told in filing a form AD 1026, which I have, and the misunderstanding by the general public and many of those that have been influential and active in promulgating these rules and regulations and didn't understand how it was going to work in the finai end—I mean this in the best sense—but we seem to have an abundance of technical knowledge and a vast shortage of practical application in many instances. It doesn't work that simply. Out in the field, it isn't like you can imagine it being.

Reference was made to the availability of maps. I can tell you that in one instance on one farm, the only map they had of any credibility in determining the location of wetlands was one map that was taken in 1964.

Senator BURDICK. Any other comment?

Mr. BERGMAN. Yes, Senator. On that very subject, I think I would agree with Mr. Scaling in saying that if you give us some time, I think

farmers have found over the years that in working with the Soil Conservation Service that they have been the helpful hand to the farmer. They can work with those district conservationists.

Given some time to sit down, just as President Burke had admitted, they will do, I believe, a commendable job working with the farmers. But the farmer needs to know, and I anticipate that this entire problem could take—covering North Dakota, because they have SWAT teams right now in the Red River Valley—that could take up to 2 years for every farmer to have that determination made, and every farmer should have a determination made of his entire farm so he knows what is a wetland and what is not.

I went in and tried to, in my county—La Moure County—tried to ask for my determination. They were reluctant to do it because down at that level, the district conservationist is worried about changing rules and someone looking over his shoulder. But I am convinced that if every farmer in the county could go in and work with the Soil Conservation people, they would feel better about the entire process. But we need time for that.

Also, may I say, along with that, that the farmer will work and will trust that district conservationist; where they have the real problem is the other people and the regulations that they have to consult with, looking over their shoulder, incidentally, is adding to the problem.

Senator BURDICK. Do any of you think that March 15 is adequate time to make these reports; get this information out?

Mr. RIVINIUS. No.

Mr. BURKE. They are not going to get it.

Mr. FRAZIER. No.

Senator BURDICK. I agree with you. I think it will take a year or two to get this before the people.

Do you believe that the USDA's efforts to educate producers about their responsibilities and potential liabilities under Swampbuster have been adequate to date? If not, what improvements would you suggest? Of course, you will have to remember now that the thing didn't become final until September. What do you think about the rest of the question?

Mr. FRAZIER. Mr. Chairman, the questions coming in from my members would indicate that the educational efforts, no, they have not been adequate. I think we must keep our eye on one item, and this is the form AD 1026. We have copies here for you. I am sure your staff has seen it. We will be glad to furnish copies of it to you.

[CLERK'S NOTE.—A copy of form AD 1026 appears on page 86 of this hearing.]

Mr. FRAZIER. Let me emphasize. This question 7 and 8, "Will an agricultural commodity be produced on any land on the farm," so on and so on, was improved since December 23, 1985; in a similar item with respect to "any land, including wet areas."

Well, we heard confusion in the earlier panel here this morning on the definition of a wet area. So with the top men of these agencies

using different expressions, you can imagine what it is like for farmers out there at the local level. They have placed the burden on the producer to identify an area that may be susceptible to the decision, and we think that they are just getting on the wrong end of the horse.

You ought to start with an examination of the map and the land and the technician's decision and notify the producer of that which is considered a wetland rather than putting the burden on him. They have got this thing going in the wrong direction, I think.

Senator BURDICK. Any further comment on this point?

Mr. RIVINIUS. Just a comment on the advance payments. If you are in a swamp area or where they have the water problems or the Swampbuster problems, if you don't sign that 1026, they won't give you any advance payments unless that is signed.

Mr. FRAZIER. And if you make a mistake, you are in deep trouble.

Mr. RIVINIUS. That is right. And if they have given you the advance payment and they find you in violation, then, of course, that money you pay back with interest.

Senator BURDICK. Mr. Burke?

Mr. BURKE. That was in my prepared testimony. We address that subject, that there are no payments forthcoming until you sign an AD 1026. That is the way it works.

Senator BURDICK. The North Dakota Farm Bureau, Farmers Union, and National Farmers Union were all represented on the North Dakota Wetlands Management Committee that adopted four recommendations on January 19 of this year. If all four of these recommendations could be implemented, would this solve North Dakota's problem with Swampbuster? If not, why not?

You are familiar with the four suggestions?

Mr. BURKE. I am on that committee. I attended the last meeting. It would be my hope and desire that your committee and the Congress could see fit to adapt to those recommendations, because they were made in good faith; they were made out in the open as much as could be; laid on the table in the state that obviously has the highest recognition as having the center of attraction; and I would certainly hope that due consideration could be given those recommendations, because they are not made without a lot of consideration.

Senator BURDICK. Any further comment?

Mr. BERGMAN. Yes; I would also say the same thing, that those recommendations were made after considerable discussion with the varying groups. We have asked today for additional things, but that will be an absolute starting point for corrections, so that should be implemented as soon as possible.

Mr. FRAZIER. Perhaps we should be sure the record is clear, too, Mr. Chairman, for the people in the back of the room listening to this testimony who are interested in wildlife and migratory birds and so on.

Surely, our intention and desire that is coming through here, we just want this thing cleared up so it can be administered fairly. We are generally broadly in support of the conservation efforts that protect migratory waterfowl and so on.

We don't mean to question the validity or the purpose of the program; it is just a matter of administering that has us in this deep trouble.

Senator BURDICK. Thank you.

Would most of this controversy be dealt with if landowners were compensated for keeping the land out of production? If so, is the Conservation Reserve Program or the Water Bank Program the best vehicle, or do you have any other suggestions?

Mr. BERGMAN. Let me just emphasize that, and then in my prepared text, that is what we ask for, yes. Producers feel that if that is really the goal and the policy of this nation to do that, they should have some compensation for that. You cannot expect to take them from the producer or the landowner, in this case, for nothing.

Senator BURDICK. Since no land has been taken out of production, what kind of compensation are you thinking of or will you be thinking of?

Mr. BERGMAN. Well, here again, those of supportive wetlands, this is, I guess, still undefined. What is a supportive wetland? In my mind, that is the class 1 or the type I wetland.

If those are the goals, to have those part of the program, the farmer has had economic value in that; he has been getting production off that. If that is the goal of this nation, to do that, then we as landowners and farmers should be paid for that.

Senator BURDICK. Any other comment on that point?

Mr. BURKE. Mr. Chairman, I would submit to you that if the wetlands areas that are designated as illustrated by previous testimony and as illustrated by these pictures were allowed to be submitted into a program such as the CRP program, and if that area were squared off into an acceptable size and shaped field and the compensation were adequate to justify the farmers doing that, then, there wouldn't be as much of a problem as there is; I am sure it would be quite widely accepted, and that would give an opportunity for the wildlife groups, the conservationists, the environmentalists and the farmers to work together toward a common goal, because I think, Mr. Chairman, that that is one of the things that I view as the most serious or one of the most serious things that is happening during this whole process, and if I could, I would like to read just a little bit that I have here, sir.

Senator BURDICK. Certainly. Go ahead.

Mr. BURKE. I have a letter in my possession here, and it is from a gentleman in the Jamestown area. He wrote me about his concerns. This gentleman has served on County ASCS committees and is familiar with the past and present agricultural programs and has received conservation awards and has even participated in wildlife preservation programs.

This farmer states in his letter, and I quote:

I view Swampbuster not only as unduly and improperly restrictive, but also as setting a very bad precedent from the standpoint of approach and philosophy. Past agricultural conservation programs used compensation to encourage voluntary participation, whereas Swampbuster uses coercion.

The gentleman goes on to say that current legislation infringes on his as well as other farmers' rights to farm.

To go further, it allows wildlife, environmental and special interest groups to inject their philosophy into land management. I want you to make note that this all comes from a man who has been awarded over the years for his conservation efforts and he actively supports good wildlife management and habitat.

I would say to you and the committee that that is one of the things that I really have a concern about—the wedge that presently is being driven between the farm sector and the other groups. We are some of the greatest conservationists that there are, and we exercise it over land that we own, land that we have acquired through hard work, land that we, more than anyone else, are interested in preserving, and it is a sad day when I see us back off side-to-side and pit one another against the other.

That isn't the way it should be. We should be working together, not accusing one or the other of doing something, some of the things that the accusations have been.

Senator BURDICK. Any other comment?

Mr. FRAZIER. One brief comment, sir. If you could initiate legislative actions to make this wetland eligible to come into the CR program, I think it would be an admirable move, and it should come in at a payment rate simply devised to compensate the producer for giving up the use of this land without being placed on a bid basis, because in this case, you are talking about relatively small tracts and the need to square up a piece of ground.

So I believe if you do make any moves along this line, that would be an important feature.

Senator BURDICK. OK. Anybody else?

[No response.]

Do you agree that no land is being taken out of production that was in production at any time prior to December 23, 1985?

Mr. RIVINIUS. I don't believe there is land that is taken out of production, and we are not draining new lands. But what the problem is that we need that designation: Is it a wetland or isn't it a wetland? Is it a prior conversion? That is the gray area that the farmers don't know what to do.

Senator BURDICK. OK.

Mr. RIVINIUS. The SCS just doesn't have the time to get all this work done.

Senator BURDICK. Do you believe that the appeals process under Swampbuster is adequate and timely? If not, what suggestions would you make to improve the process?

Mr. BURKE. Mr. Chairman, I would like to address that, because as I have indicated earlier, I did file an AD 1026 and asked for wetland determination, and certainly, again, I would commend those people who are involved, the ASCS and the SCS. But I will tell you that when I went to my local ASCS office the other day, and I had done it

deliberately to find out what the facts really were and asked about filing an appeal, they really didn't know where to start.

But I want the record very clear: I am not faulting them. As has been indicated before, these agencies need more time. This is very new. They absolutely haven't had the experience they need in handling this type of thing, and it can be worked out, but it is not going to reach perfection tomorrow.

So I went ahead and followed through on this thing, and certainly, those agencies are willing to work and willing to do, but right now, no, they are not equipped to do that. They don't know, because they have had such a short time and such a short amount of exposure to the problem, that it is in its infancy yet. Let it grow up.

Senator BURDICK. Do you think that another year would be adequate?

Mr. BURKE. I would suggest that in a year, the process of appeal and the chain it will go through will probably be determined and take a definite procedure.

Now, I am not familiar enough to know the procedures, the process that the SCS is following to determine all these things, whether that will be adequate or not. In my case, since I pressed the issue and kept pushing forward, I was one of many farmers in a large area, it was adequate. But like I said, I was the only person who was pushing the issue because I wanted to see how the process actually worked.

Senator BURDICK. But you all agree that March 15 of this year wouldn't be adequate?

Mr. BURKE. That is too early.

Mr. FRAZIER. They don't have time.

Senator BURDICK. You are shaking your head. Do you agree with that statement?

Mr. BURKE. That is too early.

Mr. RIVINIUS. A comment on the appeal process. The North Dakota Wheat Producers feel that there should be a county committee the same as there is with the ASC committee or we use the SCS committee, whichever way.

Right now, the way the rule says, if I appeal what they have designated as a wetland, I have to appeal right back to my Soil Conservation Service itself and then to his superiors. There is no local input.

Senator BURDICK. Mr. Frazier?

Mr. FRAZIER. To be specific about it, Mr. Chairman, I think your committee might accomplish a great deal if you can persuade the agencies to place these questionable cases under the failure-to-fully-comply provision that has long been involved in the ASCS administration of farm programs. This would permit not only some farmer committee judgment, but it would also permit adjustment of the penalties, so to speak, if a producer has unintentionally drained some wetland.

In other words, the penalty could be designed at a level to fit the crime, if you please. The procedure has been established for that for a long time, it is well understood in the country.

Senator BURDICK. I have been advised that certain wildlife groups are opposed to the exemption of type I wetlands from Swampbuster. Do you have any other suggestions that would achieve the same effect without exempting type I wetlands?

Mr. BERGMAN. I think there is provision under the minimal effects, given the latitude at the county level, in determining what does have minimal effect. There is also a provision of prior conversion, and this would imply, I think, to most of the cases in the Red River Valley.

If those are determined to be prior converted, that could happen, but until that determination process is gone through, it is difficult to answer that, not knowing if that will work or not.

Senator BURDICK. Any other comment?

[No response.]

That completes the questions for the moment.

Mr. RIVINIUS. Mr. Senator, we have reproduced and sent to you a copy of the testimony I would like to have for the record. I think you have that.

Senator BURDICK. We have the testimony, and all of it will be received for the record. I thank you all.

Mr. BURKE. Thank you.

Mr. FRAZIER. Thank you.

NORTH DAKOTA LEGISLATIVE COUNCIL

STATEMENT OF HON. CHARLES MERTENS, NORTH DAKOTA STATE REPRESENTATIVE, CHAIRMAN, NORTH DAKOTA LEGISLATIVE COUNCIL, DEMOCRATIC FLOOR LEADER

Senator BURDICK. The third panel will be as follows: The Honorable Charles Mertens, North Dakota State Representative, chairman of the North Dakota Legislative Council, Democratic Floor Leader; Mr. Wallace Jacobs, president, North Dakota Association of Soil Conservation Districts; Mr. Steve Hoetzer, North Dakota Water Users Association; and Mr. Cliff Issendorf, president of the North Dakota Water Resource Districts Association.

Welcome to the committee, gentlemen. You may proceed in any order that you wish. I perhaps should announce Mr. Charles Mertens first. Maybe you should start out.

Mr. MERTENS. Mr. Chairman, Senator Burdick, my testimony today addresses concerns of the Swampbuster Amendment to the Food Security Act of 1985.

Senator BURDICK. Could you bring that microphone a little closer?

Mr. MERTENS. My testimony today addresses concerns of the Swampbuster Amendment to the Food Security Act of 1985. The final regulations proposed by the Department of Agriculture to administer Swampbuster, in my opinion, go far beyond the intent of Congress and what the farmers of America thought would be required by the act.

I believe there may be a need to request the Department of Agriculture to suspend or adjust the permanent rules adopted and not to impose any penalties on farmers who may be in noncompliance of the regulations.

The wording of the act, itself, in my opinion, may have to be changed to allow the Department of Agriculture to implement the act in compliance with the intent of Congress. I will address these areas this morning in my testimony.

In the seventh grade, my science book was entitled, "Our Environment and the Changing World Around Us." It is important to remember that our environment is constantly changing. It is not the same today as it was 100 years ago, and it will not be the same in the future, even if we do nothing.

I firmly believe that the farmer is as aware or more aware of what they do to the environment than any group in our nation. I know from personal experience that the North Dakota farmers, for the most part, have improved their farms in North Dakota. I am not just talking about the productivity of soils, but also the wildlife habitat. Our soils are a national treasure. We should do nothing to hinder our farmers from improving this national treasure.

North Dakota was a grassland prairie state. As North Dakota was settled, trees were planted on the prairie. Most of the trees in our state have been planted by man. We have stopped the destructive prairie fires that destroyed everything in their path: trees, vegetation, and wildlife.

The point I am trying to make is that we must be careful not to assume that our farmers are ruining their environment and allow well-meaning environmental groups to restrict our farming practices without input from the farmers themselves.

I respectfully request that Congress hold hearings in North Dakota on the impact of Swampbuster on our farming practices and listen to the concerns of our farmers and see with your own eyes how our farmers have taken care of our soil.

I have attached copies of the act passed by Congress to my testimony and will be referring to areas that are of concern to me.

Most farmers, and, I believe, Congress, thought that the law addressed bringing new land into production. That has been that land that had been historically farmed would be exempt. In fact, under Subtitle B, Highly Erodible Land Conservation, that specific exemption is stated as: (a) Cultivated to produce any of the 1981 through 1985 crops of an agricultural commodity; or (b) set aside, diverted or otherwise not cultivated under a program administered by the Secretary for any such crops to reduce production of an agricultural commodity.

These are very key exemptions to comply with the intent of Congress, and we are talking about new lands coming into production, and they are not in the Subtitle C Wetlands Conservation portion of the bill.

This is extremely important to North Dakota. Because of the definition of wetlands in the act, much of our farmland that has been historically farmed could be described as wetlands, and the farmer could be in noncompliance for improving land that he had traditionally farmed.

As you can see by the attached article, it is requiring a battery of out-of-state specialists to review North Dakota fields and designate what are wetlands and what is not. Clearly, this goes far beyond the intention of Congress, I hope, and surely beyond the understanding that farmers had of the act.

Many of our fields have low depressions, large flat areas that do not drain properly because of artificial barriers, some caused by the dust bowl of the thirties, or very small, insignificant depressions that merely trap moisture for a brief period of time and drown out crops or cause equipment to get stuck. These are in fields that have been historically farmed and, I believe, should be exempt from the act. They are not bringing new acres into production.

North Dakota also has the distinction of having the largest concentration of shelterbelts—tree plantings—in the world. This is a conservation practice that has greatly reduced wind erosion and will prevent a repeat of the dust bowl of the thirties and air pollution of our streams and lakes, but they also catch large volumes of snow and create water problems in the fields that never had water problems before. The farmer needs the latitude to correct these problems.

That brings us to another exemption found in subtitle B that should be a part of subtitle C, and it starts in paragraph number (2), which speaks to land in a soil conservation district or in a soil conservation plan.

This would be extremely helpful to us. This is important because of the practice of using tree plantings, flax strips, et cetera, as acceptable conservation practices and also because North Dakota has a very large area of saline soil. See the attached map of North Dakota.

In Subtitle D, Conservation Reserve, the act addresses the problem of saline soils, but it was left out of Subtitle C, Wetlands, of the act.

These saline soils have a high concentration of salinity in the soil itself. If this salinity is not concentrated near the surface, especially if it can remain below the roots of the plants, the soil is highly productive. If farmers are prevented from removing excess moisture from their fields, the moisture evaporates and salinity will remain near the surface and rapidly destroy the ability of the soil to produce any vegetation.

The problem of soil salinity is so severe and the destruction of the productivity of some of our nation's prime agricultural land is so dependent on the proper control of the moisture saturation levels that it would justify a total exemption from the Swampbuster regulations.

There have been exemptions to Swampbuster in the past. The permafrost of Alaska is an example, and that is attached to my testimony.

The present regulations are extremely complicated and require a vast army of bureaucrats to enforce. This past summer we had checkers checking on the checkers to ensure compliance.

If Congress wants to preserve wetlands that are important to the nation, the fairest, simplest and most cost-effective method is to fund the Federal Water Bank Program sufficiently to pay the farmers not only to preserve the wetlands, but enhance them to make them more produc-

tive of waterfowl and other wildlife. This is a very popular program with North Dakota farmers and hunters and requires no enforcement.

One final matter that I would like to bring to the committee's attention is the continual underfunding of the appropriations to pay in lieu of taxes for federally owned wetlands. In 1986, I have already gone over it, but I have testimony presented to me that in the last 14 years, we have lost over $2 million to our schools, and most of it would have gone to our schools and to our townships because Congress has not funded the in lieu of taxes for our vast number of acres that are owned by the federal government for production of wildlife.

North Dakota has the largest number of wildlife units in the federal government. Contrary to the belief, we are doing our part. Testimony was given this morning that over 50 percent of the duck population of the United States come from the Dakota potholes. That is farmers' land. They are raising those 50 percent of the ducks. That is not the Federal Fish and Wildlife; that is farmers that are doing that.

We are not anti-environment. I think we are probably as close to nature as anyone can come, and Senator Burdick was born in the county I am talking about. But we simply have to be able to farm to the best of our ability. That is why we have our land-grant colleges; many people try to teach us how to farm.

Thank you.

Senator BURDICK. Thank you.

[The statement follows:]

Statement of Charles Mertens

My testimony today addresses concerns of the Swampbuster Amendment to the Food and Security Act of 1985.

The final regulations proposed by the Department of Agriculture to administer Swampbuster, in my opinion, go far beyond the intent of Congress and what the farmers of America thought would be required by the Act.

I believe there may be a need to request the Department of Agriculture to suspend or adjust the permanent rules adopted and to not impose any penalties on farmers that may be in non-compliance of the regulations.

The wording of the Act, itself, in my opinion may have to be changed to allow the Department of Agriculture to implement the Act in compliance with the intent of Congress. I will address these areas this morning in my testimony.

In the seventh grade, my science book was entitled "Our Environment, The Changing World Around Us." It is important to remember that our environment is constantly changing. It is not the same today as it was a hundred years ago, and it will not be the same in the future, even if we do nothing.

I firmly believe that the farmer is as aware or more aware of what they do to the environment than any group in our nation. I know from personal experience that the North Dakota farmers for the most part have improved their farms in North Dakota. I'm not just talking about the productivity of soils, but also the wildlife habitat. Our soils are a national treasure. We should do nothing to hinder our farmers from improving this national treasure.

North Dakota was a grassland prairie state. As North Dakota was settled, trees were planted on the prairie. Most of the trees in our state have been planted by man. We have stopped the destructive prairie fires that destroyed everything in its path, trees, vegetation, and wildlife.

The point I am trying to make is that we must be careful not to assume that our farmers are ruining their environment and allow well meaning environmental interest to restrict our farming practices without input from the farmers themselves.

I RESPECTFULLY REQUEST THAT CONGRESS HOLD HEARINGS IN NORTH DAKOTA ON THE IMPACT OF SWAMPBUSTER ON OUR FARMING PRACTICES, AND LISTEN TO THE CONCERNS OF OUR FARMERS AND SEE WITH YOUR OWN EYES HOW OUR FARMERS HAVE TAKEN CARE OF OUR SOIL.

I HAVE ATTACHED COPIES OF THE ACT PASSED BY CONGRESS TO MY TESTIMONY, AND WILL BE REFERRING TO AREAS THAT ARE OF CONCERN TO ME.

MOST FARMERS, AND I BELIEVE CONGRESS, THOUGHT THAT THE LAW ADDRESSED BRINGING NEW LAND INTO PRODUCTION. THEY BELIEVED THAT LAND THAT HAD BEEN HISTORICALLY FARMED WOULD BE EXEMPT. IN FACT, UNDER SUBTITLE B-HIGHLY ERODABLE LAND CONSERVATION, THAT SPECIFIC EXEMPTION IS STATED AS:

(A) CULTIVATED TO PRODUCE ANY OF THE 1981 THROUGH 1985 CROPS OF AN AGRICULTURAL COMMODITY; OR

(B) SET ASIDE, DIVERTED OR OTHERWISE NOT CULVITATED UNDER A PROGRAM ADMINISTERED BY THE SECRETARY FOR ANY SUCH CROPS TO REDUCE PRODUCTION OF AN AGRICULTURAL COMMODITY.

THESE ARE VERY KEY EXEMPTIONS TO COMPLY WITH THE INTENT OF CONGRESS, AND ARE NOT IN THE SUBTITLE C-WETLANDS CONSERVATION PORTION OF THE BILL.

THIS IS EXTREMELY IMPORTANT TO NORTH DAKOTA FARMERS. BECAUSE OF THE DEFINITION OF WETLANDS IN THE ACT, MUCH OF OUR FARM LAND THAT HAS BEEN HISTORICALLY FARMED COULD BE DESCRIBED AS WETLANDS, AND THE FARMER COULD BE IN NON-COMPLIANCE FOR IMPROVING LAND HE HAS TRADITONALLY FARMED.

AS YOU CAN SEE BY THE ATTACHED ARTICLE, IT IS REQUIRING A BETTERY OF OUT-OF-STATE SPECIALISTS TO REVIEW NORTH DAKOTA FIELDS AND DESIGNATE WHAT ARE WETLANDS AND WHAT IS NOT. CLEARLY THIS GOES FAR BEYOND THE INTENTION OF CONGRESS, I HOPE, AND SURELY BEYOND THE UNDERSTANDING THAT FARMERS HAD OF THE ACT.

MANY OF OUR FIELDS HAVE LOW DEPRESSIONS; LARGE FLAT AREAS THAT DO NOT DRAIN PROPERLY BECAUSE OF ARTIFICIAL BARRIERS CAUSED BY THE DUST BOWL OF THE 30'S; OR VERY SMALL INSIGNIFANT DEPRESSIONS THAT MERELY TRAP MOISTURE FOR BRIEF PERIODS OF TIME AND DROWN OUT CROPS OR CAUSE EQUIPMENT TO GET STUCK. THESE ARE IN FIELDS THAT HAVE BEEN HISTORICALLY FARMED AND I BELIEVE SHOULD BE EXEMPT FROM THE ACT.

NORTH DAKOTA ALSO HAS THE DISTINCTION OF HAVING THE LARGEST CONCENTRATION OF SHELTERBELTS (TREE PLANTINGS) IN THE WORLD. THIS IS A CONSERVATION PRACTICE THAT HAS GREATLY REDUCED WIND EROSION, AND WILL PREVENT A REPEAT OF THE DUST BOWL OF THE 30'S AND AIR POLLUTION OF OUR STREAMS AND LAKES; BUT THEY ALSO CATCH LARGE VOLUMES OF SNOW AND CREATE WATER PROBLEMS IN FIELDS THAT NEVER HAD PROBLEMS BEFORE. THE FARMER NEEDS THE LATITUDE TO CORRECT THESE PROBLEMS.

THAT BRINGS US TO ANOTHER EXEMPTION FOUND IN SUBTITLE B THAT SHOULD BE A PART OF SUBTITLE C. IT STARTS IN PARAGRAPH HUMBER (2) AND SPEAKS TO LAND IN A SOIL CONSERVATION DISTRICT AND/OR IN A SOIL CONSERVATION PLAN.

THIS IS IMPORTANT BECAUSE OF THE PRACTICE OF USING TREE PLANTINGS, FLAX STRIPS, ETC., AS ACCEPTABLE CONSERVATION PRACTICES AND ALSO BECAUSE NORTH DAKOTA HAS A VERY LARGE AREA OF SALINE-TYPE SOILS. SEE THE ATTACHED MAP OF NORTH DAKOTA.

IN SUBTITLE D - CONSERVATION RESERVE, THE ACT ADDRESSED THE PROBLEM OF SALINE SOILS BUT IT WAS LEFT OUT OF SUBTITLE C WETLANDS.

THESE SALINE SOILS HAVE A HIGH CONCENTRATION OF SALINITY IN THE SOIL ITSELF. IF THIS SALINITY IS NOT CONCENTRATED NEAR THE SURFACE, ESPECIALLY IF IT CAN REMAIN BELOW THE ROOTS OF PLANTS, THE SOIL IS HIGHLY PRODUCTIVE. IF FARMERS ARE PREVENTED FROM REMOVING EXCESS MOISTURE FROM THEIR FIELDS, THE MOISTURE EVAPORATES AND THE SALINITY WILL REMAIN NEAR THE SURFACE AND RAPIDLY DESTROY THE ABILITY OF THE SOIL TO PRODUCE ANY VEGETATION.

THE PROBLEM OF SOIL SALINITY IS SO SEVERE,AND THE DESTRUCTION OF PRODUCTIVITY OF SOME OF OUR NATION'S PRIME AGRICULTURAL LAND IS SO DEPENDANT ON THE PROPER CONTROL OF THE MOISTURE SATURATION LEVEL,THAT IT WOULD JUSTIFY A TOTAL EXEMPTION FROM SWAMPBUSTER REGULATIONS.

THE PRESENT REGULATIONS ARE EXTREMELY COMPLICATED AND REQUIRE A VAST ARMY OF BUREAUCRATS TO ENFORCE. THIS PAST SUMMER WE HAD CHECKERS CHECKING ON THE CHECKERS TO INSURE COMPLIANCE.

IF CONGRESS WANTS TO PRESERVE WETLANDS THAT ARE IMPORTANT TO THE NATION, THE FAIREST, SIMPLEST, AND MOST COST-EFFECTIVE METHOD IS TO FUND THE FEDERAL WATERBANK PROGRAM SUFFICIENTLY TO PAY THE

FARMERS TO NOT ONLY PRESERVE THE WETLANDS BUT ENHANCE THEM TO MAKE THEM MORE PRODUCTIVE OF WATERFOWL AND OTHER WILDLIFE. THIS IS A VERY POPULAR PROGRAM WITH NORTH DAKOTA FARMERS AND HUNTERS, AND REQUIRES NO ENFORCEMENT.

ONE FINAL MATTER THAT I WOULD LIKE TO BRING TO THE COMMITTEE'S ATTENTION IS THE CONTINUAL UNDERFUNDING OF THE APPROPRIATION TO PAY IN LIEU OF TAXES FOR FEDERALLY OWNED WETLANDS. IN 1986, THE FEDERAL GOVERNMENT PAID ONLY 60% OF THE IN-LIEU OF TAXES. IN MY COUNTY OF RAMSEY, THIS WAS A $14,000 LOSS TO THE SCHOOL DISTRICTS AND TOWNSHIPS. FEDERAL LEGISLATION REQUIRES CONGRESS TO APPROPRIATE THIS MONEY. IT IS PART OF THE INTERIOR DEPARTMENT'S BUDGET. THE EXACT AMOUNT IS KNOWN AND ASKED FOR. WHEN CONGRESS CUTS THIS BUDGET, THEY TAKE MONEY AWAY FROM SCHOOL DISTRICTS. ONLY ONCE IN THE PAST TEN YEARS HAS CONGRESS MET ITS OBLIGATION.

IN CONCLUSION, I WOULD REQUEST THIS COMMITTEE TO HOLD HEARINGS IN NORTH DAKOTA AS SOON AS POSSIBLE. IN THE MEANTIME, A REQUEST TO SUSPEND THE FINAL REGULATIONS SHOULD BE MADE TO THE DEPARTMENT OF AGRICULTURE.

TITLE XII—CONSERVATION

SUBTITLE A—DEFINITIONS

DEFINITIONS

SEC. 1201. (a) For purposes of subtitles A through E:

(1) The term "agricultural commodity" means—

(A) any agricultural commodity planted and produced in a State by annual tilling of the soil, including tilling by one-trip planters; or

(B) sugarcane planted and produced in a State.

(2) The term "conservation district" means any district or unit of State or local government formed under State or territorial law for the express purpose of developing and carrying out a local soil and water conservation program. Such district or unit of government may be referred to as a "conservation district", "soil conservation district", "soil and water conservation district", "resource conservation district", "natural resource district", "land conservation committee", or a similar name.

(3) The term "cost-sharing payment" means a payment made by the Secretary to an owner or operator of a farm or ranch containing highly erodible cropland under the provisions of section 1234 (b) of this Act.

(4)(A) The term "converted wetland" means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose or to have the effect of making the production of an agricultural commodity possible if—

(i) such production would not have been possible but for such action; and

(ii) before such action—

(I) such land was wetland; and

(II) such land was neither highly erodible land nor highly erodible cropland.

(B) Wetland shall not be considered converted wetland if production of an agricultural commodity on such land during a crop year—

(i) is possible as a result of a natural condition, such as drought; and

(ii) is not assisted by an action of the producer that destroys natural wetland characteristics.

(5) The term "field" means such term as is defined in section 718.2(b)(9) of title 7 of the Code of Federal Regulations (as of January 1, 1985), except that any highly erodible land on which an agricultural commodity is produced after the date of enactment of this Act and that is not exempt under section 1212 shall be considered as part of the field in which such land was included on such date, unless the Secretary permits modification of the boundaries of the field to carry out subtitles A through E.

(6) The term "highly erodible cropland" means highly erodible land that is in cropland use, as determined by the Secretary.

(7)(A) The term "highly erodible land" means land—

(i) that is classified by the Soil Conservation Service as class IV, VI, VII, or VIII land under the land capability classification system in effect on the date of the enactment of this Act; or

(ii) that has, or that if used to produce an agricultural commodity, would have an excessive average annual rate of erosion in relation to the soil loss tolerance level, as established by the Secretary, and as determined by the Secretary through application of factors from the universal soil loss equation and the wind erosion equation, including factors for climate, soil erodibility, and field slope.

(B) For purposes of this paragraph, the land capability class or rate of erosion for a field shall be that determined by the Secretary to be the predominant class or rate of erosion under regulations issued by the Secretary.

(8) The term "hydric soil" means soil that, in its undrained condition, is saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation.

(9) The term "hydrophytic vegetation" means a plant growing in—

(A) water; or

(B) a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content.

(10) The term "in-kind commodities" means commodities that are normally produced on land that is the subject of an agreement entered into under subtitle D.

(11) The term "rental payment" means a payment made by the Secretary to an owner or operator of a farm or ranch containing highly erodible cropland to compensate the owner or operator for retiring such land from crop production and placing such land in the conservation reserve in accordance with subtitle D.

(12) The term "Secretary" means the Secretary of Agriculture.

(13) The term "shelterbelt" means a vegetative barrier with a linear configuration composed of trees, shrubs, and other approved perennial vegetation.

(14) The term "State" means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

(15) The term "vegetative cover" means—

(A) perennial grasses, legumes, forbs, or shrubs with an expected life span of 5 or more years; or

(B) trees.

(16) The term "wetland", except when such term is part of the term "converted wetland", means land that has a predominance of hydric soils and that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions.

(b) The Secretary shall develop—

(1) criteria for the identification of hydric soils and hydrophytic vegetation; and
(2) lists of such soils and such vegetation.

Subtitle B—Highly Erodible Land Conservation

PROGRAM INELIGIBILITY

Sec. 1211. Except as provided in section 1212, and notwithstanding any other provision of law, following the date of enactment of this Act, any person who in any crop year produces an agricultural commodity on a field on which highly erodible land is predominate shall be ineligible for—

(1) as to any commodity produced during that crop year by such person—

(A) any type of price support or payment made available under the Agricultural Act of 1949 (7 U.S.C. 1421 et seq.), the Commodity Credit Corporation Charter Act (15 U.S.C. 714 et seq.), or any other Act;

(B) a farm storage facility loan made under section 4(h) of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b(h));

(C) crop insurance under the Federal Crop Insurance Act (7 U.S.C. 1501 et seq.);

(D) a disaster payment made under the Agricultural Act of 1949 (7 U.S.C. 1421 et seq.); or

(E) a loan made, insured, or guaranteed under the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.) or any other provision of law administered by the Farmers Home Administration, if the Secretary determines that the proceeds of such loan will be used for a purpose that will contribute to excessive erosion of highly erodible land; or

(2) a payment made under section 4 or 5 of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b or 714c) during such crop year for the storage of an agricultural commodity acquired by the Commodity Credit Corporation.

EXEMPTIONS

Sec. 1212. (a)(1) During the period beginning on the date of the enactment of this Act and ending on the later of January 1, 1990, or the date that is 2 years after the date land on which a crop of an agricultural commodity is produced was mapped by the Soil Conservation Service for purposes of classifying such land under the land capability classification system in effect on the date of enactment of this Act, except as provided in paragraph (2), no person shall become ineligible under section 1211 for program loans, payments, and benefits as the result of the production of a crop of an agricultural commodity on any land that was—

(A) cultivated to produce any of the 1981 through 1985 crops of an agricultural commodity; or

(B) set aside, diverted or otherwise not cultivated under a program administered by the Secretary for any such crops to reduce production of an agricultural commodity.

(2) If, as of January 1, 1990, or 2 years after the Soil Conservation Service has completed a soil survey for the farm, whichever is later,

a person is actively applying a conservation plan based on the local Soil Conservation Service technical guide and approved by the local soil conservation district, in consultation with the local committees established under section 8(b) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)) and the Secretary, or by the Secretary, such person shall have until January 1, 1995, to comply with the plan without being subject to program ineligibility.

(b) No person shall become ineligible under section 1211 for program loans, payments, and benefits as the result of the production of a crop of an agricultural commodity—

(1) planted before the date of enactment of this Act;

(2) planted during any crop year beginning before the date of enactment of this Act;

(3) on highly erodible land in an area—

(A) within a conservation district, under a conservation system that has been approved by a conservation district after the district has determined that the conservation system is in conformity with technical standards set forth in the Soil Conservation Service technical guide for such district; or

(B) not within a conservation district, under a conservation system determined by the Secretary to be adequate for the production of such agricultural commodity on any highly erodible land subject to this title; or

(4) on highly erodible land that is planted in reliance on a determination by the Soil Conservation Service that such land was not highly erodible land, except that this paragraph shall not apply to any agricultural commodity that was planted on any land after the Soil Conservation Service determines that such land is highly erodible land.

(c) Section 1211 shall not apply to a loan described in section 1211 made before the date of enactment of this Act.

SOIL SURVEYS

SEC. 1213. The Secretary shall, as soon as is practicable after the date of enactment of this Act, complete soil surveys on those private lands that do not have a soil survey suitable for use in determining the land capability class for purposes of this subtitle. In carrying out this section, the Secretary shall, insofar as possible, concentrate on those localities where significant amounts of highly erodible land are being converted to the production of agricultural commodities.

Subtitle C—Wetland Conservation

PROGRAM INELIGIBILITY

SEC. 1221. Except as provided in section 1222 and notwithstanding any other provision of law, following the date of enactment of this Act, any person who in any crop year produces an agricultural commodity on converted wetland shall be ineligible for—

(1) as to any commodity produced during that crop year by such person—

(A) any type of price support or payment made available under the Agricultural Act of 1949 (7 U.S.C. 1421 et seq.), the Commodity Credit Corporation Charter Act (15 U.S.C. 714 et seq.), or any other Act;

(B) a farm storage facility loan made under section 4(h) of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b(h));

(C) crop insurance under the Federal Crop Insurance Act (7 U.S.C. 1501 et seq.);

(D) a disaster payment made under the Agricultural Act of 1949 (7 U.S.C. 1421 et seq.); or

(E) a loan made, insured, or guaranteed under the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.) or any other provision of law administered by the Farmers Home Administration, if the Secretary determines that the proceeds of such loan will be used for a purpose that will contribute to conversion of wetlands (other than as provided in this subtitle) to produce an agricultural commodity; or

(2) a payment made under section 4 or 5 of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b or 714c) during such crop year for the storage of an agricultural commodity acquired by the Commodity Credit Corporation.

EXEMPTIONS

SEC. 1222. (a) No person shall become ineligible under section 1221 for program loans, payments, and benefits as the result of the production of a crop of an agricultural commodity on—

(1) converted wetland if the conversion of such wetland was commenced before the date of enactment of this Act;

(2) an artificial lake, pond, or wetland created by excavating or diking non-wetland to collect and retain water for purposes such as water for livestock, fish production, irrigation (including subsurface irrigation), a settling basin, cooling, rice production, or flood control;

(3) a wet area created by a water delivery system, irrigation, irrigation system, or application of water for irrigation; or

(4) wetland on which production of an agricultural commodity is possible as a result of a natural condition, such as drought, and without action by the producer that destroys a natural wetland characteristic.

(b) Section 1221 shall not apply to a loan described in section 1221 made before the date of enactment of this Act.

(c) The Secretary may exempt a person from section 1221 for any action associated with the production of an agricultural commodity on converted wetland if the effect of such action, individually and in connection with all other similar actions authorized by the Secretary in the area, on the hydrological and biological aspect of wetland is minimal.

CONSULTATION WITH SECRETARY OF THE INTERIOR

SEC. 1223. The Secretary shall consult with the Secretary of the Interior on such determinations and actions as are necessary to carry out this subtitle, including—

(1) the identification of wetland;

(2) the determination of exemptions under section 1222; and

(3) the issuance of regulations under section 1244 to carry out this subtitle.

Subtitle D—Conservation Reserve

CONSERVATION RESERVE

SEC. 1231. (a) During the 1986 through 1990 crop years, the Secretary shall formulate and carry out a conservation reserve program, in accordance with this subtitle, through contracts to assist owners and operators of highly erodible cropland in conserving and improving the soil and water resources of their farms or ranches.

(b) The Secretary shall enter into contracts with owners and operators of farms and ranches containing highly erodible cropland to place in the conservation reserve—

(1) during the 1986 crop year, not less than 5, nor more than 45, million acres;

(2) during the 1986 through 1987 crop years, a total of not less than 15, nor more than 45, million acres;

(3) during the 1986 through 1988 crop years, a total of not less than 25, nor more than 45, million acres;

(4) during the 1986 through 1989 crop years, a total of not less than 35, nor more than 45, million acres; and

(5) during the 1986 through 1990 crop years, a total of not less than 40, nor more than 45, million acres.

(c)(1)(A) Notwithstanding subsection (b), effective for each of the fiscal years 1986 through 1989, the Secretary may reduce by up to 25 percent the number of acres of highly erodible land required to be placed under contract during each fiscal year if the Secretary determines that the rental payments to be made under section 1233(b) on such acres are likely to be significantly lower in the succeeding year.

(B) Paragraph (A) shall not affect the requirements of paragraph (5) of subsection (b).

(2) The Secretary may include in the program established under this subtitle lands that are not highly erodible lands but that pose an off-farm environmental threat or, if permitted to remain in production, pose a threat of continued degradation of productivity due to soil salinity.

(d) Under the program established under this subtitle, the Secretary shall not place under contract more than 25 percent of the cropland in any one county, except that the Secretary may exceed the limitation established by this subsection in a county to the extent that the Secretary determines that such action would not adversely affect the local economy of such county.

(e) For the purpose of carrying out this subtitle, the Secretary shall enter into contracts of not less than 10, nor more than 15, years.

DUTIES OF OWNERS AND OPERATORS

SEC. 1232. (a) Under the terms of a contract entered into under this subtitle, during the term of such contract, an owner or operator of a farm or ranch must agree—

(1) to implement a plan approved by the local conservation district (or in an area not located within a conservation district, a plan approved by the Secretary) for converting highly erodible cropland normally devoted to the production of an agricultural commodity on the farm or ranch to a less intensive use (as defined by the Secretary), such as pasture, permanent grass,

[From the Devils Lake, N.D. Journal, Wednesday, January 13, 1988]

Conservationists to identify valley wetlands

FARGO, N.D. (AP) — Eighteen soil conservation officials from as far away as Texas, Florida and Oregon arrived in North Dakota to begin identifying wetlands in the Red River Valley.

The team will spend a month in the state working with maps, photographs and county Soil Conservation Service officials to make master lists of wetlands in the seven counties in the Red River Valley of North Dakota and Minnesota.

The project stems from the federal swampbuster program that was authorized by the 1985 farm bill. The program has been unpopular with many farmers because it defined much of the Red River Valley, which is an ancient lake bed, as wetland.

Under the swampbuster program, farmers could lose federal payments if they drain or fill sloughs to plant crops.

The team will use soils maps, National Wildlife Inventory maps, Agricultural Stabilization and Conservation Service slides and photographs, infrared pictures, climatological data, SCS photos and topographical maps, said Dave Dewald, an SCS biologist in Bismarck.

The team members also will take field trips and use information from farmers, he said.

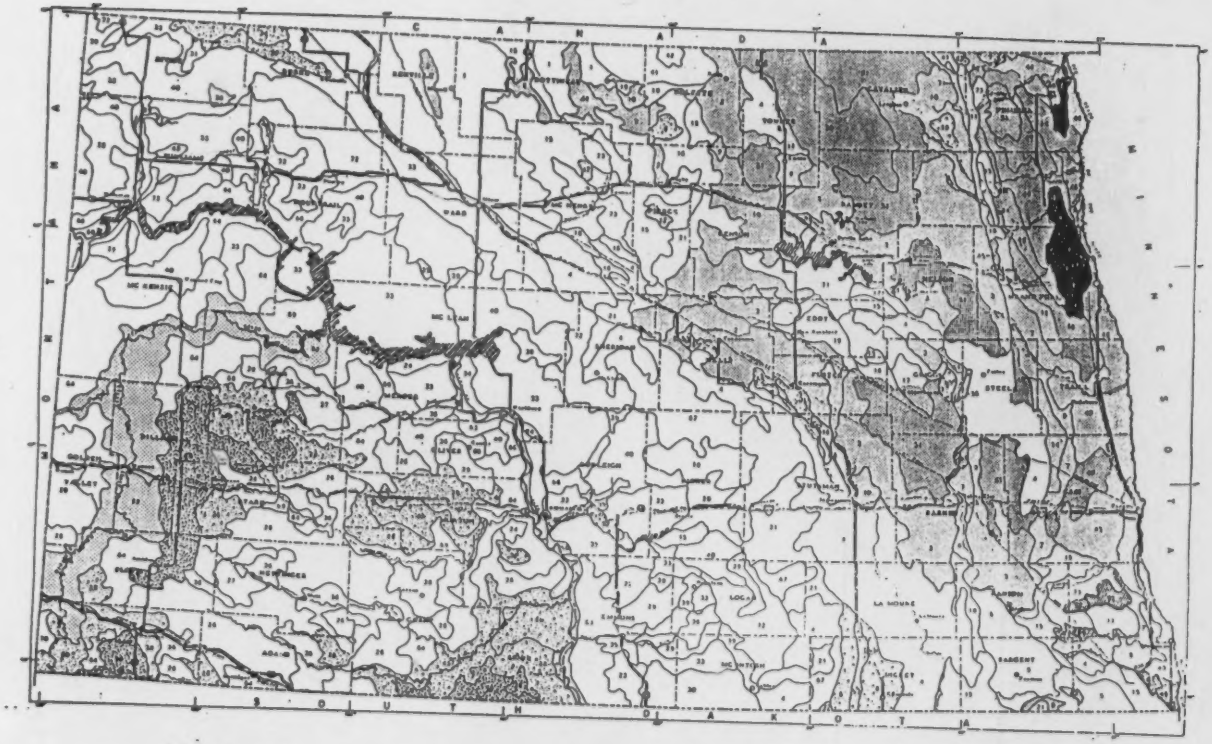
Fred Garst, a soil conservation technician from Harrisonburg, Va., said he hoped the duty would give him a new perspective on wetlands issues in the nation.

Garst, who gathered with the team Monday in Fargo, will stay in Breckenridge, Minn., and help identify wetlands in Richland County, North Dakota.

After the team is finished, county conservation officials will send master lists to farmers, who will have 15 days to inspect them and challenge the designations.

Top priorities in the program will be determining wetlands on fields farmed by Farmers Home Administration borrowers and farmers who have said they plan to move dirt on their land, Dewald said.

SODIC AND SALINE AFFECTED SOILS



SODIC SOILS

- Severe problem area
- Inclusions in productive land

SALINE SOILS

- Severe problem area
- Locally severe in productive land
- Inclusion in productive land

MISCELLANEOUS

- Badlands
- Open water

Red River Valley Wet Lands As A Production Management Factor

Carl Fanning, Extension Soils Specialist
(Legislative Hearing, 11/30/87, Fargo)

Recent geologic history of the Red River Valley as a shallow fresh water lake predisposes the area to surface drainage problems. However, the Valley has been farmed for almost a century and with time has developed an effective but not particularly efficient drainage system.

Public Fund Drainage Systems

The county road system, with graded ditches to protect road beds, is the mainstay of the Red River Valley drainage network. This is complemented and enhanced by public funded drain ditches that collects and moves water across country through intermittent channels and depressions.

With county road ditches as exceptions, other public drains in the valley have been installed on a need and funds available basis. Diking, to contain channel flow along major stream courses and in local areas, to control cross country sheet water flow, has occurred through the same time period. The combined ditching - diking system functions with variable efficiency among communities.

Local interests have dominated. A comprehensive, efficient, overall drainage design to maximize the areas production potential was not developed in the early history of the area. Later designs have retained the inefficiencies of existing systems.

Private Fund - Field Drainage

Tile drains are rare in the Red River Valley. The dominant problem is surface wetness that delays spring work and early seeding. Initially the least expensive and most efficient surface drainage technique was to plow fields in parallel strips building a central crown and a dead furrow drain.

In many fields the parallel strip, crown and dead furrow surface drainage system has existed in place since county roads were installed. Water removal efficiency with these parallel strips has often been improved with earth moving equipment to deepen and widen the dead furrow using removed earth to increase the crown.

Maintenance of the dead furrow drain by removing accumulated silt at the road ditch outlet is a common fall work chore. Mold board plowing has diminished as the primary tillage method but the surface drainage system still exists and is maintained in other tillage systems on an as needed basis.

Similarly, mold board plows were used to build dead furrow drains between minor depressions in irregular patterns across fields. These also exist in their original pattern with periodic maintenance, usually at the road ditch outlet.

Land Leveling

Fields leveled to a uniform grade with a tail water collecting systems are found in local areas across the Red River Valley. The inherent flatness of the lake bed soils has encouraged engineering this surface

water management practice. Elevation change in the landscape is modest. Depressions that collect water and delay field work seldom exceed elevation differences of a foot. Most are less than 6 inches. However, the cost and benefits of land leveling when compared with crown and furrow drainage has limited its adoption.

Benefits - Field Surface Drainage

It should be recognized that intent in Red River Valley surface drainage is to manage spring thaw water in a manner that allows seeding and harvesting the entire field. Drainage system depressions are shallow and intended to be farmed across.

The production management benefits from surface drainage is dominated by two factors, both with significant economic impact. Early seeding and field work time use efficiency.

Wet depressions in a growers field either delays field work until the entire field is dry or requires equipment be moved back to the field at a later date to complete work on small irregular shaped patches. Moving back into field is often accompanied by considerable down time remounting or changing equipment after completion of other chores.

Yield loss accompanies delayed seeding in addition to time use inefficiencies during a heavy work load period When the peak seeding time for small grains is missed yields drop about 1% for each day of seeding delay. The combined yield loss - added labor and machines use inefficiency cost can be significant.

Example

A 600 acre small grain operation that requires returning to a field following a 10-day delay to finish preseeding tillage on 100 acres also seeds, sprays and harvests on a delayed schedule. yield loss and added costs as follow may occur.

(100 A x 50 Bu/A x $2.50/Bu) x 10% yield loss	= $1,250.00
(100 A x $24.00/A repair, fuel & labor) x 10% added cost	= $ 240.00
Total 100 Acre loss	$1,490.00

In operations where the examples series of facts apply wet ground reduces gross return $14.90/A. Good managers in the Red River Valley are disturbed with losses half this value.

Asset Value Loss

Two factors dominate as wet land management problems with direct impact on asset value in the Red River Valley. These are a) potential for yield loss from delayed seeding and b) salinization from uncontrolled high water tables. Technically, both can be resolved and the production potential or the lands asset value improved with properly designed drainage systems. However, drainage as an asset improvement tool and landowner choice based on return from the drainage investment has been abrogated with interpretation of the 1985 Food Security Act.

Salinization is a special problem with potential for uncontrolled localized growth under current provisions of the food security act. The process where capillary water from a saline water table rises to the surface, evaporates and leave salt behind can take several years to salt out ground. Mistakes in designed drain depth that ponds water or raises water table levels along a drain take several years to develop into a

salty ground problem. Deepening drains corrects the problem. The 1985 Food Security Act fixes drain depth in pertuity at the original design levels.

Evidence that this problem can be serious is easy to find in the Red River Valley. Salty ground in a linear pattern parallel to county road ditches across poorly drained areas is a common feature. In the past county funds have been used to correct this problem through deepening drains or cleaning silted in drains.

Public Agency Liability

Legislative attention needs to be given to the potential for public liability for land damage through salinization along public drains. Clearly, local government bodies are exposed, without recourse, for damage caused by drain designs they may not be able to correct under provisions of the 1985 Food Security Act.

New Drain Design Tool

Salinization rate in a high water table area is time and salt concentration dependent. Past research on the salinization problem has focused on aspects of drain depth design to control water table elevations. This approach has had practical advantages and operated under available public funds and suitable drain outlet constraints.

Recent research at North Dakota State University and the University of Minnesota provides tools for evaluating affects of ground water levels and salt concentration on eventual concentrations found at the soil surface.

This work has practical application for use with existing engineering design criteria. Appendix 1 shows water table depth has controling impact on salinization. Also, eventual salt concentration at the soil surface above a shallow water table can be accessed with the following straight line equation.

Surface concentration* = 17161 - 338 (sp) + 860 (c) + 0.34 (Ec)

Where: sp = soil texture factor
c = climate factor
Ec = Electrical conductivity of the ground water

*Identification of Critical Depth and Critical Salinity of the Ground Water on North Dakota High Water Table Crop Land, Seelig, Carcana and Maianu, NDSU Research Project Technical Completion Report, Project #03, 1987.

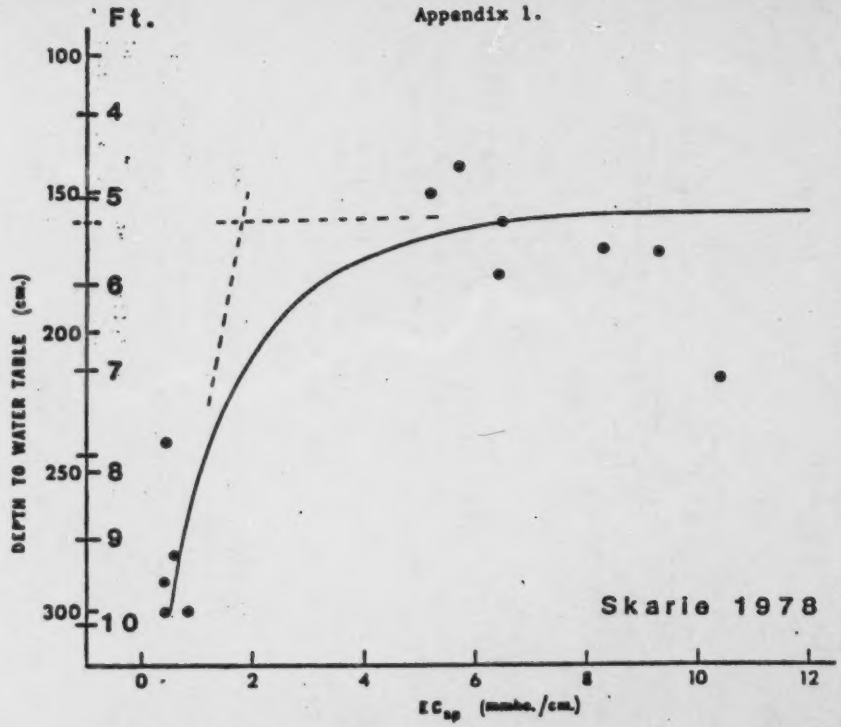


Figure 6. Relation of water-table depth (1/19/77) and electrical conductivity of surface horizon for 12 sites in Clay County, Minnesota.

Source: Richard A. Skarie, Soil Salinity in Clay County, Minnesota and the Application of Infrared Imagery to the Delineation of Affected Areas. M.S. Thesis, University of Minnesota, 1978.

Regulations.

in the opinion of the Secretary of the Treasury, to prepay would adversely affect the operation of the Federal Financing Bank: *Provided*, That any regulations under this provision shall be issued and become effective within 30 days of enactment of this Act.

EXCLUSION OF PERMAFROST SOILS FROM DEFINITION OF "WETLAND"

Alaska.
16 USC 3801.

Section 1201(a)(16) of Public Law 99-198 (99 Stat. 1505) is amended by inserting at the end thereof the following: "For purposes of this Act, and any other Act, this term shall not include lands in Alaska identified as having high potential for agricultural development which have a predominance of permafrost soils.".

ELDERLY FEEDING PROGRAM

For an additional amount for reimbursement at a level of 56.76 cents per meal during fiscal years 1985 and 1986, determined under section 311(a)(4) of the Older Americans Act of 1965 (42 U.S.C. 3030a(a)(4)), for meals served under section 311 of such Act in such fiscal years, $8,500,000, to remain available until expended.

Ante, p. 78.

CHAPTER II

DEPARTMENT OF COMMERCE

ECONOMIC DEVELOPMENT ADMINISTRATION

ECONOMIC DEVELOPMENT ASSISTANCE PROGRAMS

(INCLUDING DISAPPROVAL OF DEFERRAL)

Congress.
President of U.S.

The Congress disapproves the proposed deferral D86-36 in the amount of $40,000,000 for Economic Development Assistance Programs, as set forth in the message of February 5, 1986, which was transmitted to the Congress by the President. This disapproval shall be effective upon enactment into law of this Act and the amount of the proposed deferral disapproved herein shall be made available for obligation.

99 Stat. 1136.
99 Stat. 1316.

Of the total amount appropriated and available under this head in Public Law 99-180, $790,000 shall be obligated to supplement funds allocated pursuant to section 108(a)(2) of Public Law 99-190.

Of the total amount appropriated and available under this head in Public Law 99-180, $791,000 shall be obligated to supplement funds allocated pursuant to section 108(a)(5) of Public Law 99-190.

Upon the request of the Pike Place Market Preservation and Development Authority, Seattle, Washington, the Secretary of Commerce shall authorize the sale or lease to any person of the Fairley Group Building (project numbers 07-01-01890, as modified by 07-01-01890.01, and 07-11-02606) located in the Pike Place Market, King County, Washington, without affecting the Federal assistance provided under the Public Works and Economic Development Act of 1965, if the transfer documents provide for the continued use of the Fairley Group Building as a public market during the expected useful life of the building: *Provided*, That the provisions of 13 CFR 314.4 and OMB Circular A-102 Attachment N are hereby waived so long as the Fairley Group Building remains in the control of the public authority and is used as a public market during the expected useful life of the building.

42 USC 3121 note.

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

OPERATIONS, RESEARCH, AND FACILITIES

For an additional amount for "Operations, research, and facilities" to maintain public warning and forecast services and aircraft services, $10,822,000, to remain available until expended.

DEPARTMENT OF JUSTICE

LEGAL ACTIVITIES

SALARIES AND EXPENSES, UNITED STATES MARSHALS SERVICE

For an additional amount for "Salaries and expenses, United States Marshals Service", $2,600,000.

SUPPORT OF UNITED STATES PRISONERS

For an additional amount for support of United States prisoners in non-Federal institutions, $3,000,000.

FEDERAL BUREAU OF INVESTIGATION

SALARIES AND EXPENSES

(INCLUDING RESCISSION)

For an additional amount for "Salaries and expenses" for the relocation within the District of Columbia of the Washington field office, $10,000,000, to remain available until expended.

Of available funds provided under this head in Public Law 98-166 and Public Law 99-88 for the relocation within the District of Columbia of the Washington field office, $10,000,000 are rescinded.

The limitation in Public Law 99-180 on the receipts credited to this appropriation from fees collected to process fingerprint identification records for noncriminal employment and licensing purposes is increased by $1,000,000.

IMMIGRATION AND NATURALIZATION SERVICE

SALARIES AND EXPENSES

For an additional amount for "Salaries and expenses", $3,000,000.

FEDERAL PRISON SYSTEM

SALARIES AND EXPENSES

For an additional amount for "Salaries and expenses", $18,000,000.

ADMINISTRATIVE PROVISIONS

Of the funds appropriated to the Department of Justice in Public Law 99-180, not to exceed $150,000 from "Fees and Expenses of Witnesses", not to exceed $150,000 from "Salaries and Expenses, Antitrust Division", not to exceed $100,000 from Emergency Assistance in "Office of Justice Programs, Justice Assistance", and not to exceed $100,000 from the Public Safety Officers' Benefits Program

Effects of Delayed Seeding, Poor Drainage and Reduced Rotations on Crop Diseases

Marcia McMullen
Extension Plant Pathologist
North Dakota State University

Hard red spring wheat and durum wheat crops in North Dakota were subjected to a series of stresses in 1986 and 1987 that combined to result in poor yields and quality in many areas of the state. Diseases were a major stress on all wheat crops in 1986, primarily because of late seeding, abundance of fungal spores, and frequent rains and high humidities that favored infection of leaf and head diseases. In 1986 wheat diseases accounted for an estimated $120-$150 million in lost revenue to North Dakota farm producers. In 1987, severe root, leaf and head diseases of wheat occurred primarily in the durum growing areas of the state and an estimated $75-$100 million was lost to durum growers. These estimated figures do not contain an unestimated additional loss of tax base for the state of North Dakota. In addition to wheat and other small grain disease losses, high moistures during critical parts of the growing seasons of 1986 and 1987 favored certain row crop diseases such as white mold of dry beans and head molds of sunflowers.

The high level of wheat and other crop diseases that occurred in 1986 and 1987 illustrates the potential threat of diseases to harm yields and quality. Certain management practices will reduce the risk of disease, while others may increase disease risk.

To reduce risk of crop diseases farm producers can manage: date of planting; proper field selection; rotations; residue; varieties; and use of chemical protection. I would like to concentrate on the first four of these management practices, the four that are most affected by current farm programs.

Date of planting. Delayed, reduced or restricted drainage of a field will result in cooler, wetter soils and higher water tables which, in turn, can lead to delayed seeding of a crop and increased risk of certain diseases on poorly drained soils. For small grains, a general rule of thumb, based on long-term research, is that for every one day delay in seeding, there is about a 1% yield reduction. For example: a 10 day delay = 10% yield reduction; on a 50 bu/A yield potential field this would be a loss of 5 bu/A because of the seeding delay. There are two main reasons for this yield loss. One is an increased risk of the crop encountering heat stress at the critical stages when the grain head is forming (4-5 leaf stage) and when the grain is flowering, pollinating and filling. Earlier seeding generally means the crop is exposed to cooler temperatures at these stages. The second reason is the potential exposure of the crop to increased levels of disease organisms that have multiplied during this additional time, diseases such as leaf rust and tan spot.

Delayed seeding also can increase the risk of some row crop diseases. If, because of late seeding, the maturity of the row crop is pushed into late fall, this results in increased risk of diseases such as soybean pod and stem blight, corn ear molds (a problem in 1985) and sunflower head molds (severe problem in 1986).

Field selection. Farm producers generally select fields for their high value crops based on several factors, some of which include previous crop and herbicide history, soil texture, soil fertility, and soil moisture. Under certain practices or environmental conditions, soil moisture may not be limiting for a given crop, but instead may be excessive. Inadequately or poorly drained soils increase the risk of many soil-borne crop diseases. All crops, including wheat, are more susceptible to fungal seedling blights and damping off under poor drainage and poor soil aeration.

1986 Payments in Lieu of Taxes

	FISH & WILDLIFE		STATE GAME & FISH	
COUNTY	Acres	Payment	Acres	Payment
Nelson	3,053.23	$ 2,556.00	858.32	$ 1,560.14
Ramsey	15,144.70	20,128.00	376.15	956.65
Steele	3,251.75	3,613.00	1,155.66	4,831.75
Griggs	2,480.75	1,649.00	102.95	143.76
Grand Forks	4,868.27	4,998.00	3,151.53	5,714.66
Total	28,798.70	$32,944.00	5,644.61	$13,206.96

The Fish & Wildlife payments in lieu of taxes were 60% of what the real estate taxes would have been in 1986. The total real estate taxes for these 5 counties for Game & Fish property would have been about $54,906.67. That is a total loss of approximately 21,962.67 in these 5 counties. Also, these payments are divided between the townships and the schools. The counties and the fire districts get nothing.

The State Game & Fish payments in lieu of taxes were 100% of the real estate taxes.

Letter From Sarah Vogel, Assistant Attorney General, State of North Dakota

The Honorable Charles Mertens
Member of the House of Representatives
718 Seventh Street
Devils Lake, ND 58301

January 21, 1988

Re: Testimony to the Senate Committee on Appropriations, Sub-committee on Agriculture, Rural Development and Related Agencies

Dear Representative Mertens:

Attorney General Nicholas Spaeth has asked me to respond to your request for an analysis of the defects in the publication process used by USDA to implement the wetlands conservation ("Swampbuster") provisions of the Food Security Act of 1985.

The Swampbuster Regulation Publication Process

The Food Security Act (the Act) was adopted on December 23, 1985. Pub. L. 99-198, 99 Stat. 1525. The provisions relating to wetland conservation are found at Subtitle C of the Act. Section 1244 of the Act required the Secretary of Agriculture to issue regulations not later than 180 days after the effective date of the Act (or June 24, 1986). Interim rules were not published until June 27, 1986, with an effective date of June 24, 1986. 51 Fed. Reg. 23495-23514. No prior public comment was allowed. Id. After publication of the interim rule, USDA solicited comments for 60 days. Id. Final regulations were not published until September 17, 1987. 52 Fed. Reg. 35194-35206.

By law, USDA was required to consult with the Department

of Interior prior to publication of regulations. See § 1223 of the Act. USDA consulted with the Fish and Wildlife Service as is shown by the List of Preparers provided as an Appendix to the June 1986 "U.S. Department of Agriculture Environment Assessment for the Wetland Conservation Provisions of the Food Security Act of 1985)".

By law USDA was also required to consult with the public before issuing regulations. As explained below, USDA disregarded this obligation.

Overview of the Administrative Procedure Act

The Administrative Procedure Act (APA) was adopted in 1946 to establish uniform, procedural rights to the public that must be followed by administrative agencies before they may publish regulations having the force and effect of law. 5 U.S.C. § 551 et seq. Under the APA, informal notice and comment rulemaking is governed by 5 U.S.C. § 553.

The courts have recognized that "the APA provisions reflect a judgment by Congress that the public interest is served by a careful and open review of administrative rules and regulations." Alcaraz v. Block, 746 F.2d 593, 610 (9th Cir. 1984) (quoting Philadelphia Citizens in Action v. Schweiker, 669 F.2d 877, 881 (3rd Cir. 1982)). The United States Court of Appeals for the Ninth Circuit has written:

> This [APA] framework creates a pre-publication dialogue which allows the agency to educate itself on the full range of interests the rule affects, . . . and reintroduces a representative public voice, thus ensuring "fairness to affected parties after governmental authority has been delegated to unrepresentative agencies," . . . through sensitive, efficient governmental decision making. See generally, Stewart, The Reformation of American Administrative Law, 88 Harv.L.Rev. 1667, 1676 (1975) ("Insofar as statutes do not effectively dictate agency actions, individual autonomy is vulnerable to the imposition of sanctions at the unruled will of executive officials . . . who are not formally accountable to the electorate.").

Alcaraz v. Block, 746 F.2d 593, 611 (9th Cir. 1982) (citations omitted).

The APA first requires that general notice of a proposed rule shall be published in the Federal Register. 5 U.S.C. § 553(b). This notice shall include either the terms or substance of the proposed rule or a description of the subjects and issues involved. 5 U.S.C. § 553(b)(3). Two exemptions from the prior publication requirements are provided: "(A) to interpretive rules, general statements of policy, or rules of agency organization, procedure or practice; or (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest. 5 U.S.C. § 553(b)(A)-(B).

After the advance notice required by § 553(b), the agency shall give interested persons the opportunity to participate in the rulemaking through submission of written

data, views or arguments with or without opportunity for oral presentation. 5 U.S.C. § 553(c). After consideration of the relevant matter presented, the agency shall incorporate into the rules adopted a concise general statement of their basis and purpose. 5 U.S.C. § 553(c). Finally, a substantive rule is to be published not less than 30 days before its effective date with three exceptions: (1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretive rules or statements of policy; or (3) as otherwise provided by the agency. Id.

In summary, unless an agency rule falls within one or more of the enumerated exemptions, an agency must:

(1) Publish a proposed rule in advance of adoption;

(2) Allow and consider public comment;

(3) Issue a statement of basis and purpose on adopting of a rule; and

(4) Allow at least 30 days before a final published rules becomes effective.

USDA and its Agencies are Subject to Notice and Comment Rulemaking Under the APA

Before discussing the procedural validity of the Swampbuster rulemaking, it is important to note that USDA has administratively removed itself and its constituent agencies from the exemption of 5 U.S.C. 553(a)(2) for "a matter relating to . . . public property, loans, grants, benefits or contracts."

In 1971, the Secretary of Agriculture stated as a policy that all agencies of the Department of Agriculture will follow the public participation requirements prescribed by 5 U.S.C. § 553(b) and (c) in rulemaking relating to public property, loans, grants, benefits, or contracts. 36 Fed. Reg. 13804 (July 24, 1971). In adopting its policy, the Secretary said:

> The advantages of implementing the conference's recommendations that the public be afforded an opportunity for greater participation in the formulation of rules relating to public property, loans, grants, benefits or contracts will outweighs any disadvantages such as increased costs and delays." 36 Fed. Reg. 13804 (July 24, 1971). Moreover, the Secretary said that the "good cause" exemption to prior publication should be used "sparingly that is, only when there is a substantial basis therefore." Id. (emphasis added.)

Since its 1971 statement that it would be bound by notice and comment rulemaking, USDA and its agencies have repeatedly been held to those standards by a number of courts. Rodway v. USDA, 514 F.2d 809 (D.C.Cir. 1975); Alcaraz v. Block, 746 F.2d 593, 611 (9th Cir. 1984); Arlington Oil Mills, Inc. v. Knebel, 543 F.2d 1091, 1095 and n.6 (5th Cir. 1976); South Carolina v. Block, 558 F.Supp. 1004, 1012-1013, (D.S.C. 1983); Reyes v. Klein, 411 F.Supp. 1241, 1245 (D.N.J. 1976); Anderson v. Butz, 428 F.Supp. 245, 249 (E.D. Cal. 1975).

Procedural Defects in Publication of the Swampbuster Regulations

The first defect in publication of the Swampbuster regulation is that USDA failed to publish proposed Swampbuster regulations for comment by the public.

Instead, USDA worked solely with its own employees and employees of the US Fish and Wildlife Service to draft a so-called "interim" regulation which became effective 3 days before it was published.

As a result, farmers and farm organizations were unable to provide relevant facts or suggestions to USDA that might have influenced USDA to address some of the farmers' concerns with respect to implementation of the Act.

USDA claimed that 180 days provided insufficient time to allow public comment. See 51 Fed. Reg. 23496. However, the courts have generally rejected agencies' claims of time pressures as a valid excuse for failing to comply with the APA.

Exemptions to the notice and comment publication requirements of 5 U.S.C. § 553 are to be "'narrowly construed . . . and only reluctantly countenanced.'" State v. N.J. v. U.S. Environmental Protection Agency, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

The Eighth Circuit, in construing the "good cause" exemption to the 30-day requirement of 5 U.S.C. § 553(d), said "the good cause exemption was not to be an 'escape clause which may be arbitrarily exercised but requires legitimate grounds supported in law and fact by the required finding. Legitimate grounds were defined as "urgency of conditions coupled with demonstrated and

unavoidable limitations of time.'" U.S. v. Gavrilovic, 551 F.2d 1099, 1104 (8th Cir. 1977) (quoting 92 Cong. Rec. 5650-51 (1946) (remarks of Cong. Walter)). (Emphasis supplied).

Other courts have noted that the exceptions may not be arbitrarily utilized at the agency's whim but rather should be limited to emergency situations. See American Federation of Government Employees v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (citing S. Rep. No. 752, 79th Cong., 1st Sess. (1945)). Nor should the "good cause" exception be used to circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them. U.S. Steel Corp. v. U.S. Environmental Protection Agency, 595 F.2d 207, 214 (5th Cir. 1979).

In this instance, USDA had six months to effect regulations to implement the Swampbuster part of the Act. This six month period should have been adequate to permit publication of a proposed rule and to allow public comment.

USDA's Allowance of After-the-Fact Comments was Not Adequate Compliance with the APA.

In its June 27, 1986 announcement of the interim Swampbuster rules, USDA said that the public could file comments on the interim rule on or before August 26, 1986. See 51 Fed. Reg. 23496.

USDA thereafter received 2696 letters contained 8400 comments. See 52 Fed. Reg. 35195 (Sept. 17, 1987).

However, USDA's consideration of these comments was inevitably affected by the fact that the regulations had already been in place for two crop years by the time USDA completed evaluation of the comments and published final rules based on the comments.

USDA had already invested a considerable amount of time and money on implementation of the interim rules before it completed evaluation of the comments. To illustrate this point, USDA announced on the publication date of the final regulation that it had already "developed fact sheets, brochures, displays, radio and television spots, news releases and other media material which are being used to better inform landowners and operators of the conservation provisions of the Act." 52 Fed. Reg. 35195 (Sept. 27, 1987) (Emphasis supplied.)

It is because of an agency's reluctance to change regulations already in force that the APA requires prior publication of proposed regulations. Generally, allowance of after-the-fact comments does not remedy a failure to allow prior comment. As stated by the Eighth Circuit Court of Appeals:

> Provision of prior notice and comment allows effective participation in the rulemaking process while the decisionmaker is still receptive to information and argument. After

> the final rule is issued, the petitioners must come hat-in-hand and run the risk that the decisionmaker is likely to resist change.

U.S. Steel Corp. v. EPA, 649 F.2d 572, 576 (8th Cir. 1981) (quoting Sharon Steel Corp. v. EPA, 597 F.2d 377, 381 (3rd Cir. 1979).

Conclusion

Farmers have identified many difficulties with the Swampbuster regulations. These difficulties include the definition of a "wetland", USDA's failure to complete timely soil surveys, USDA's imposition of immediate penalties for alleged violation of the regulation before an appeal can be completed, the interpretation of the "minimal effect" provision of the Act, and USDA's use of forms that are confusing and misleading. It is quite possible that these concerns and other could have been positively addressed before the regulations became effective if USDA had followed the APA in the publication of its Swampbuster regulations by publishing proposed regulations, by allowing public comment to be considered before the regulation went into effect, and by having a delayed effective date so that the public would have a period of time to adjust to the new regulations.

If I can be of further assistance to you or the committee, please do not hesitate to call or write me.

Sincerely,

Sarah Vogel

Sarah Vogel
Assistant Attorney General

NORTH DAKOTA ASSOCIATION OF SOIL CONSERVATION DISTRICTS

STATEMENT OF GARY PUPPE, EXECUTIVE VICE PRESIDENT

ACCOMPANIED BY WALLACE JACOBS, PRESIDENT

Senator BURDICK. Next, Mr. Jacobs.

Mr. PUPPE. Mr. Chairman, Senator Burdick, I will be giving the testimony on behalf of the North Dakota Association of Soil Conservation Districts. My name is Mr. Gary Puppe, and Mr. Jacobs is down at the end of the table.

Senator BURDICK. Please go ahead.

Mr. PUPPE. It is a distinct pleasure for us to appear before the subcommittee on behalf of the North Dakota Association of Soil Conservation Districts. We applaud your efforts to gather testimony on the problem dealings with Swampbuster. In the past few months, the Swampbuster issue has surfaced as the hottest issue in the agricultural community. It has caused farmers a high level of frustration and uncertainty and fear of the consequences or penalties for even the slightest violation.

We must recognize that Swampbuster is permanent legislation. It is not something that is going to go away in 2 or more years. The final rules are far reaching, and farmers want to know where they stand. They want to continue to operate their farms and plant their crops and have an understanding that what they are doing is proper, and they don't want to deal with the uncertainties of noncompliance.

We are pleased that the Soil Conservation Service is accelerating its efforts to make wetland determinations in North Dakota. Even though the process of making wetland determinations, as we understand it, is 15 months from being completed across the entire state, at least the process is underway.

But of all the actions that need to be done, making wetland determinations is the most important. Farm operators need to know if they have wetlands, nonwetlands, prior-converted wetlands, or converted wetlands. And we strongly support completing that task in making wetland determinations as soon as possible.

Our members, who are the elected and appointed Soil Conservation district supervisors in our state, have thoroughly analyzed the Swampbuster provision. And we are well aware of the farmer's frustrations and concerns. For decades, our organization has stood for voluntary efforts with incentives to protect our resources. We strongly support education, research, technical assistance, and financial incentives as the basis for soil and water conservation programs. Now, with the passage of the 1985 Food Security Act, USDA is rapidly being regarded as a regulatory department in administering the conservation provisions of this act.

Our organization prefers USDA place their primary emphasis on educating and helping farmers comply with Swampbuster rather than being placed in a position of seeking violations or telling farmers how to farm their land.

We feel the Swampbuster issue can be made more acceptable to farmers in North Dakota by making a few modifications. We recommend: That you exempt type I wetlands from the wetland definition. The wetland definition, as published in the September 17, 1987, Federal Register, is far too broad. As we understand it, few people are qualified to identify wetlands according to the definition. Farmers, of course, are not. It is a technical determination.

The farmers, do, however, understand that areas of standing water in their fields with cattails. for example, are wetlands. On land they have cropped, even for 50 years or more, farmers are being informed that low or shallow depressions in their fields that may hold water for only a few days—they are often called wet areas—could be included in the wetland definition. These areas are considered cropland, and farmers have used many methods to deal with these wet areas.

For example, a farmer may pull a plow furrow from the center of a low area in a field to a road ditch as a precaution. This allows the low areas to be rid of excess water if it is a wet spring. When the fields become workable in the spring of the year, the farmer tills his field, which erases the plow furrow, and then plants the entire field. The process of pulling a plow furrow may or may not be done each fall, depending on how the land will be used the following year, such as for grain crop, diverted acres, et cetera. These areas, known as type I wetlands, should be exempt.

Providing adequate Federal Water Bank Program funding is the second recommendation. Generally, farmers will voluntarily retain natural wetlands on their farms if there is adequate compensation. There needs to be an economic alternative to drainage. The Conservation Reserve Program is an economic alternative to farming highly erodible land. A well-funded Federal Water Bank Program or a Wetland Reserve Program similar to CRP could also provide an economic alternative to farming wetlands.

Loss of USDA program benefits on all the land you farm is a penalty much too severe for violating Swampbuster. It is the one and only penalty, regardless of how minor or how severe the violation. Recognizing the severity of the penalties, farmers will make a good-faith effort to comply, but first they need to know what the wetland status is on their farm.

It is the planting of an annual crop that ultimately places an operator in violation, not the harvesting of the crop. Until the wetland determinations can be made, some relief should be granted and at least allow the farmer to destroy or not harvest the affected area to avoid violation. This becomes especially critical because maintenance of existing drains is important to thousands of farm operators, especially in the Red River Valley.

No one wants to be found in violation because they improperly cleaned out a 50-year-old drain and then lose their farm program benefits. As with other farm programs, the local ASCS county committees should have the authority to recommend or determine the penalty to match the severity of the violation.

The North Dakota Association of Soil Conservation Districts has had a longstanding policy that water and wetland preservation activities be balanced to protect agriculture, water, and wildlife and to provide mutual cooperation and accommodations of wetland, farm and water objectives and interests.

Mr. Chairman, thank you for the opportunity to testify. We believe if our recommendations were initiated, Swampbuster would be more readily acceptable by our members and the people of our state.

Senator BURDICK. Thank you very much.

[The statement of Wallace Jacobs follows:]

STATEMENT OF WALLACE JACOBS

Chairman Burdick and members of the Senate Agriculture Appropriations Subcommittee, it is a distinct pleasure for me to appear before this Subcommittee on behalf of the North Dakota Association of Soil Conservation Districts. We applaud your efforts to gather testimony on the problems dealing with Swampbuster. In the past few months, the Swampbuster issue has surfaced as the hottest issue in the agriculture community. It has caused farmers a high level of frustration, uncertainty and fear of the consequences or penalties for even the slightest violation.

We must recognize that Swampbuster is permanent legislation. It is not going to go away in two more years. The final rules are far reaching. Farmers want to know where they stand. They want to continue to operate their farms and plant their crops and have an understanding of what they are doing is proper and they don't want to deal with the uncertainties of non-compliance.

We are pleased the Soil Conservation Service is accelerating its efforts to make wetland determinations in North Dakota. Even though the process of making wetland determinations is 15 months from being completed, the process is underway. Of all the actions that need to be done, making wetland determinations is the most important. Farm operators need to know if they have wetlands, non-wetlands, prior converted wetlands or converted wetlands. We strongly support completing that task as soon as possible.

Our members -- the elected and appointed soil conservation district supervisors in North Dakota -- have thoroughly analyzed the Swampbuster Provision. We are well aware of farmer's frustrations and concerns. For decades, our organization has stood for "voluntary" efforts, with incentives, to protect our resources. We strongly support education, research, technical assistance and financial incentives as the basis for soil and water conservation programs. Now, with the passage of the 1985 Food Security Act, USDA is rapidly being regarded as a regulatory department in administering the conservation provisions of this Act.

Our organization prefers USDA place their primary emphasis on educating and helping farmers comply with Swampbuster rather than being placed in a position of seeking violations or telling people how to farm their land.

We feel the Swampbuster issue can be made more acceptable to farmers in North Dakota by making a few modifications. We recommend:

1. Exempt Type I Wetlands from the Wetland Definition. The wetland definition, as published in the September 17, 1986 Federal Register, is far too broad. As we understand it, few people are qualified to identify wetlands according to the definition. Farmers are not. Farmers do, however, understand that areas of standing water in their fields with cattails are "wetlands". On land they have cropped, even for 50 years or more, farmers are being informed that low or shallow depressions in their fields that may hold water for only a few days, (wet areas) could also be included in the wetland definition. These areas are considered cropland, and farmers have used many methods to deal with these wet areas. For example, each fall a farmer may pull a plow furrow from the center of a low area in a field to a road ditch as a precaution. This allows the low areas to be rid of excess water if it is a wet spring. When the field becomes workable in the spring of the year, the farmer tills his field, which erases the plow furrow, and then plants the entire field. The process of pulling a plow furrow may or may not be done each fall, depending how the land will be used the following year such as for a grain crop, diverted acres, etc. These areas, known as Type I Wetlands, should be exempt.

   Exempting Type I Wetlands, as defined by the U.S. Department of the Interior, U.S. Fish and Wildlife Circular 39, dated 1971, would allow for a practical application of the regulations. As a matter of record, this 17 year old publication indicates only 357,700 acres

of Type I Wetlands remain in the five state areas of Montana, Wyoming, Nebraska, South Dakota and North Dakota.

2. Provide Adequate Funding for the Federal Water Bank Program. Generally, farmers will voluntarily retain natural wetlands on their farms if there is adequate compensation. There needs to be an economic alternative to drainage. The Conservation Reserve Program is an economic alternative to farming highly erodible land. A well funded Federal Water Bank Program or a Wetland Reserve Program similar to CRP could also provide an economic alternative to farming wetlands.

3. Loss of USDA program benefits on all the land you farm is a penalty much too severe for violating Swampbuster. It's the one and only penalty, regardless how minor or how severe the violation. Recognizing the severity of the penalties, farmers will make a good faith effort to comply but first they need to know what the wetland status is on their farm. Its the planting of an annual crop that ultimately places an operator in violation - not the harvesting of the crop. Until the wetland determinations can be made, some relief should be granted and at least allow the farmer to destroy or not harvest the affected area to avoid violation. This becomes especially critical because maintenance of existing drains is important to thousands of farm operators especially in the Red River Valley. No one wants to be found in violation because they improperly cleaned out a 50 year old drain and then lose their farm program benefits. As with other farm programs, the local ASCS County Committees should have the authority to recommend or determine the penalty to match the severity of the violation.

The North Dakota Association of Soil Conservation Districts has had a long standing policy that water and wetland preservation activities be balanced to protect agriculture, water and wildlife; and to provide mutual cooperation and accommodation of wetland, farm and water objectives and interests.

Mr. Chairman, thank you for the opportunity to testify. We believe, if our recommendations were initiated, Swampbuster would be more readily accepted by our members and the people of our state.

NORTH DAKOTA WATER RESOURCE DISTRICTS ASSOCIATION

STATEMENT OF CLIFF ISSENDORF, PRESIDENT

Senator BURDICK. Mr. Issendorf.

Mr. ISSENDORF. Yes, Senator. Mr. Chairman and Senator Burdick, members of the committee, and the distinguished people in this audience, my name is Cliff Issendorf, and I am the president of the North Dakota Water Resource Districts Association. Each of North Dakota's 53 counties has at least one water resource district established by state law to manage the surface water resources within a district. Since North Dakota is the center of the prairie pothole region of North America, the job of serving on a water resource district is extremely difficult and controversial. Protection of wetlands, drainage, and improvement of agricultural lands are at the heart of this conflict and controversy.

We are especially concerned about the severity and rigidness of the final Swampbuster regulations. As a water manager and a farmer, I can appreciate the need to provide a balance between agricultural concerns and wildlife and wetland protection.

In fact, since 1985, the North Dakota water and wildlife interests have cooperated on a variety of issues. These efforts have resulted in

compromise and balance between wildlife, water, and agricultural concerns. The rigidity and the inflexibility of the final Swampbuster regulations threaten to diminish, if not destroy, the potential for further cooperative efforts between water, wildlife, and farm groups.

We support the consensus recommendations submitted by Governor Sinner on behalf of the North Dakota Wetlands Management Committee. The recommendations submitted by Governor Sinner are common areas that water, agriculture, and wildlife groups can and do support, and we urge you to address the comments included in Governor Sinner's document immediately.

I would like to deviate from my written testimony just a moment to identify some of the groups that are on the North Dakota Wetlands Management Committee. We have representation from Ducks Unlimited on that committee, we have the North Dakota Chapter of the Wildlife Society, the National Wildlife Federation, the North Dakota Game and Fish, North Dakota Fish and Wildlife Service, and other wildlife groups.

In addition, we believe the following recommendations could be favorably considered without jeopardizing Swampbuster's intent of protecting wetlands and discouraging additional land from being brought into production.

No. 1: Compensation to farmers for protecting wetlands. If wetlands are going to be protected as a national priority, we believe farmers should be compensated. We strongly urge that the conservation reserve portion of the farm bill be expanded to include payments for farmers for the protection of wetlands. Only in this manner will wetlands be protected in the long term.

No. 2: The severity of the penalty. We believe that the penalty and the enforcement of Swampbuster should be changed, primarily in the area of allowing a farmer to restore converted wetlands if it is determined that such wetland conversion is in violation of Swampbuster.

This would be a big help in relieving the anxiety over the administration and the enforcement of Swampbuster.

No. 3: Mitigation. While the final rules have a provision which does recognize that mitigation could be utilized under the minimal effects exemption, we believe that mitigation should be encouraged by all sides of the issue. Mitigation, or replacing converted wetlands by restoring previously converted wetlands, simply makes sense. The same number of wetlands exist; there is no new agriculture production; but management and efficiency will both be accomplished. We strongly urge this kind of flexibility as a part of Swampbuster regulations.

No. 4: The definition of a wetland. We believe a simple amendment to the Swampbuster law could be made to state that type I wetlands, or land farmed 3 out of 5 years, would not be considered a wetland. This would exempt those areas which are currently farmed, are of little value to wildlife, and still protect what most people would agree are wetlands.

If a farmer has a small depression in the middle of his field no bigger than a backyard swimming pool, which he farms virtually every

year, it is inconceivable that government regulations could classify such an area as a wetland. Nonetheless, this is the case under the final rules. We would urge that the definition of a wetland be revised so that type I wetlands, which have been farmed at least 3 out of 5 years, are not considered to be wetland under the parameters of this law.

We appreciate your holding this hearing on the Swampbuster issue so that we can express our concerns about this most controversial issue. Hopefully, these concerns can be accommodated in a spirit of cooperation with wildlife and agricultural interests.

I have an additional comment that I would like to make in regard to your classification of type I wetlands. I went into our local ASCS office, and I filed the form 1026, identified my drains, and some of our drains had been in over 20 years.

During the identification process, there was some land in our area that is heavy soil, high clay content. We cannot farm that land, although it has been drained for 20 years, on the same timetable that we farm the rest of the land in this quarter.

I did not want to accept the classification that the Soil Conservation Service put on it that it was a wetland, even though we had a ditch put through it for 20 years. I was informed that I could appeal it. Before I had gone in and done this identification, I had done a normal operating procedure of cleaning that ditch, driving a tractor into a ditch. It is about an 8-inch deep ditch; pull the scrapper, pulled off about 40 or 50 feet from the ditch and dumped the soil.

Under your present classifications of your wetland and your violations, I violated Swampbuster. I placed dirt in a wetland, a wetland that I did not know could possibly be classified as a wetland. In so doing, I would have jeopardized the deficiency payment for at least three people. I do not believe that you can classify wetlands without identifying them to the farmer. He has to know what he is up against. Thank you.

Senator BURDICK. Thank you very much.

[The statement follows:]

STATEMENT OF CLIFFORD ISSENDORF

Mr. Chairman, Senator Burdick, Members of the Committee, and distinguished people in the audience. My name is Clif Issendorf, and I am President of the North Dakota Water Resource Districts Association. Each of North Dakota's 53 counties has at least one water resource district established by state law to manage the surface water resources within a district. Since North Dakota is in the center of the Prairie Pothole Region of North America, the job of serving on a water resource district is extremely difficult and controversial. Protection of wetlands and drainage and improvement of agricultural lands are at the heart of this conflict and controversy.

We are especially concerned about the severity and rigidness of the final Swampbuster regulations. As a water manager and a farmer, I can appreciate the need to provide a balance between agricultural concerns and wildlife and wetland protection. In fact, since 1985, North Dakota water and wildlife interests have cooperated on a variety of issues. These efforts have resulted in compromise and balance between wildlife, water, and agriculture concerns. The rigidity and inflexibility of the final Swampbuster Regulations threaten to diminish, if not destroy, the potential for further cooperative efforts between water, wildlife and farm groups.

We support the consensus recommendations submitted by Governor Sinner on behalf of the North Dakota Wetlands Management Committee. The recommendations submitted by Governor Sinner are common areas that water, agriculture, and wildlife groups can and do support, and we urge you to address the comments included in Governor Sinner's document immediately.

In addition, we believe the following recommendations could be favorably considered without jeopardizing Swampbuster' intent of protecting wetlands and discouraging additional land being brought into production.

1. Compensation to Farmers for Protecting Wetlands. If wetlands are goint to be protected as a national priority, we believe farmers should be compensated. We strongly urge that the Conservation Reserve Provisions of the Farm Bill be expanded to include payment for farmers for protection of wetlands. Only in this manner will wetlands be protected in the long-term.

2. Severity of Penalty. We believe that the penalty and enforcement of Swampbuster should be changed, primarily in the area of allowing a farmer to restore converted wetlands if it is determined that such wetland conversion is in violation of Swampbuster. This would be a big help in relieving anxiety over the administration and enforcement of Swampbuster.

3. Mitigation. While the final rules have a provision which does recognize that mitigation could be utilized under the minimal effect exemption, we believe that mitigation should be encouraged by all sides of the issue. Mitigation, or replacing converted wetlands by restoring previously converted wetlands, simply makes sense. The same number of wetlands exist, there is no new agriculture production, but management and efficiency will be both accomplished. We strongly urge this kind of flexibility as a part of the Swampbuster Regulations.

4. Definition of Wetlands. We believe a simple amendment to the Swampbuster Law could be made to state that Type I wetlands, or land farmed 3 out of 5 years, would not be considered a wetland. This would exempt those areas which are currently farmed and are of little value to wildlife, and still protect what most people would agree are wetlands.

If a farmer has a small depression in the middle of his field no bigger than a backyard swimming pool, which he farms virtually every year, it is inconceivable that government regulations would classify such an area as a wetland. Nonetheless, this is the case under the final rules. We would urge that the definition of wetland be revised so that Type I wetlands, which have been farmed at least 3 out of the last 5 years, are not considered to be wetland under the parameters of the law.

We appreciate you holding this hearing on the Swampbuster issue, so that we can express our concerns about this most controversial issue to you. Hopefully these concerns can be accommodated in a spirit of cooperation with wildlife and agriculture interests. Thank you.

North Dakota Water Users Association

STATEMENT OF STEVE HOETZER

Senator Burdick. The last witness, I believe, is Steve Hoetzer.

Mr. Hoetzer. Senator, ladies and gentlemen, my name is Steve Hoetzer, and I would like to thank you for the opportunity to present some concerns of the 1985 Food Security Act.

First of all, our organization supports the positions taken by Mr. Issendorf of the North Dakota Water Users Association and the other people who have testified today for North Dakota.

Over the past 2 years, the North Dakota Water Users Association has submitted written comments to USDA and met with representatives of the SCS to express our concerns about the proposed regulations governing the wetland provisions of the Food Security Act. To date, few or none of our concerns have been addressed, and we believe this is the reason for your having this hearing today.

There are four major areas that we wish to address. The first of these issues is the cleaning and maintenance of manmade and natural channels. The rules need to be clarified so that farmers and water resource districts can clean out waterways without fear of reprisals or loss of farm benefits. The rules are specifically silent in this area, and provisions must be included to remove any doubt that natural and artificial channels can be cleaned and maintained without fear of becoming ineligible.

The construction of ditches and placement of culverts by state, county, and township road departments should not jeopardize payments to individual producers. There have been concerns expressed by governmental agencies and farmers that land may have to be condemned to ensure that farmers do not become accused of collusion in the construction of channels or the placement of culverts.

Our second concern is type I exemptions. The key point in exemption of type I wetlands is that they lie in cropland and that their drainage will not bring additional cropland into production.

These seasonally flooded areas are very shallow, a matter of inches, and exist for a few days and up to a few weeks. They produce a crop every year, except in periods of abnormally high precipitation. They are termed by most farmers as nuisance potholes, which are difficult to farm around and must be cultivated and seeded in separate operations. Many are never drained, but some become problems over time or with the introduction of specialty crops or planting in late years.

Our third concern is the minimal impact of hydrological and biological aspects of a wetland. The rules do not permit a water resource district or landowners to work with wildlife interests to develop projects which are acceptable to both water and wildlife interests and which are consistent with the intent of Swampbuster regulations to prevent the production of new agriculture commodities on converted wetlands.

For example, a project may convert 10 acres of wetland, but restore or create 20 acres of wetlands. The net result, in actuality, would be more wetlands and a decrease in production, but this type of activity would not be permitted under existing rules of the USDA. Mitigation and replacement is not permitted under the current rules.

We totally disagree, since the conservation plan whereby converted wetlands are replaced with restored wetlands could easily be constituted to have a minimal hydrologic and biological impact on the wetland.

The tragedy of USDA's failure to permit this kind of cooperation effort between wildlife and farm interests is that cooperative efforts are discouraging rather than encouraging the production of wildlife. In North Dakota, we have been involved in a wetlands war for more than two decades.

Only recently there have been a series of peace treaties, so to speak, signed and cooperative efforts between the opposing interests. The current regulations will discourage cooperation and set the stage for renewed wetland conflicts. This, in our belief, would be a terrible tragedy.

Our fourth concern is the definition of the term wetland. The USDA and the Congress wrote the following definitions:

> Land that has a predominance of hydric soils and that both hydric soils and hydrophitic vegetation must be present under current land use practices for an area to be defined as a wetland.

We have interpreted this to mean that both hydric soils and hydrophitic vegetation must be present under current land use practices for the area to be defined as a wetland.

Current practices by the USDA place little emphasis on the presence of hydrophitic vegetation and the presence of hydric soils. The SCS in North Dakota is currently relying on aerial photographs such as the National Wetland Inventory, ASCS and SCS photographs to identify wetland areas. I would like to point out that the National Wetland Inventory was done in 1979, an extremely wet year in North Dakota,

and over 50 percent of the state was identified in late March and early April of that year.

Attached are current guidelines which we have submitted used by the SCS to evaluate wetland in North Dakota, and they clearly know the emphasis on aerial photography and not parameters as set out by Congress.

In closing, we are concerned that the implementation of the rules governing the protection of wetlands will create controversy between the producers and the wetland managers. Most farmers are good managers and respect wildlife values, but some compromises will have to be made to make this whole process work. The one single issue that would go the furthest to reduce tensions in North Dakota would be to exempt type I wetlands from the provisions of this act.

We have also submitted additional issues which we would like the committee to consider in their deliberation and thank you for allowing us to present our concerns at this time.

Senator BURDICK. Thank you very much.

[The statement follows:]

STATEMENT OF STEPHEN M. HOETZER

Senator Burdick, distinguished member of the Committee, ladies and gentlemen; my name is Stephen Hoetzer, and I would like to thank you for this opportunity to present some of the concerns the North Dakota Water Users Association have about the "Swamp Buster" provisions of the 1985 Food and Security Act. First our organization supports the positions taken by Mr. Issendorf of the North Dakota Water District Association and also positions presented by the N.D. Farmers Union and the N.D. Farm Bureau. Our four groups have been in general agreement on the key issues associated with Swamp Buster legislation since December 1985.

Over the past two years the N.D. Water Users Association has submitted written comment to USDA and meet with representative of the SCS to express our concerns about the proposed regulation governing the wetland provision of the Food and Security Act. To date, none of our concerns have been addressed by U.S.D.A. and that may be why we are having these hearings.

There are three (3) key areas that we wish to address and one specific problem on the definition of a "wetland" as stated in the legislation and how it has been interpreted by U.S.D.A. with the assistance of the SCS.

The three key issues are:

- Cleaning and Maintenance of Natural and Manmade channels and drains.

  The rules need to be clarified so that farmers and Water Resource Districts can clean out waterways without fear of reprisals or loss of farm benefits. The rules are specifically silent in this area and provisions must be included to remove any drought

that natural and artificial channels can be cleaned and maintained without fear of ineligibly determinations.

The construction of ditches and placement of culverts by State, County and Township roadway department should not jeopardize payments to individual producers. There has been concerns expressed by governmental agencies and farmers that lands may have to be condemned to insure that a farm is not accused of collusion in the construction of channels or the placement of culverts.

- Type I Wetlands exemption.

  The key point in exemptio. Type I wetland is that they lie in cropland and that their drainage will not bring additional cropland into production. These seasonally flooded areas are very shallow, a matter of inches, and exists for few days or up to a few weeks. They produce a crop every year, except in periods of abnormally high precipitation. They are termed by most farms a nuisance potholes which are difficult to farm around and must be cultivated and seeded as a separate operation. Many are never drained but some become a problem over time or when special crops are planted.

- Minimal Impact on the Hydrological and Biological Aspect of Wetland.

  The rules do not permit a Water Resource District or landowner to work with wildlife interests to develop projects which are acceptable to both water and wildlife interests, and which are consistent with the

intent of the Swamp Buster Law to prevent production of new agriculture commodity on converted wetland. For example, a project may convert 10 acres of wetland, but restore or create 20 new acres of wetlands. The net result is actually more wetlands and decreased production, but this type of activity would not be permitted under the existing rules. Representatives of U.S.D.A. have argued that mitigation or replacement is not permitted under the law. We totally disagree, since a conservation plan whereby converted wetlands are replaced with restored wetlands could easily be construed to have a minimal hydrological and biological impact on wetlands. The tragedy of U.S.D.A.'s failure to permit this kind of cooperative effort between wildlife and farm interests is that cooperative efforts are discouraged rather than encouraged. In North Dakota, we have been involved in a wetlands war for two decades. Only recently there have been a series of "peace treaties" and cooperative efforts between the opposing interests. The current Regulations will discourage cooperation and set the stage for renewed wetland conflicts. This would be terribly unfortunate.

- Wetland Definition:

  The legislation defines the term wetland to mean: "land that has a predominance of hydric soils and that <u>both</u> hydric soils <u>and</u> hydrophilic vegetation <u>must be</u> present under current land use practices for an area to be defined as a wetland". We have interpreted this to mean that both hydric soils and hydrophilic vegetation must be present under current land use practices for an area to be defined as a wetland. Current practices of USDA place little

emphasis on the presence of hydrophilic vegetation, the presence of hydric soils. The SCS in North Dakota is currently relying on aerial photography, such as the National Wetland Inventory, ASCS and SCS photographs to identify wetland areas. Attached are current guide lines used by the SCS to evaluate wetlands in North Dakota and they clearly show the emphasis on aerial photography and not the parameters set out by Congress.

In closing, we are concerned that the implementation of the rules governing the protection of wetlands between the farmer/producer and the Soil Conservation Service which in the long run may cause more harm than good. Most farms are good managers and respect wildlife values but some compromises will have to be made to make this whole process work. The one single issue that would go the fartherest to reduce tension in North Dakota would be to exemption Type I wetlands from the provision of this act.

Attached are additional issues that the committee may wish to consider which our association has discussed with USDA in the past and which have not been addressed. Thank you for permitting us to present our concerns and consider our position.

Additional Concerns

1. Definition of Wetland. This definition provides that land is considered "wetland" if it has a predominance of hydric soils and is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that "under normal circumstances" does support, a prevalence of hydrophytic vegetation. The term "under normal circumstances" is not further defined anywhere in the Interim Regulations. For the sake of clarity and consistency for producers and regulatory agencies, it

is strongly recommended that the term "under normal circumstances" be defined as follows:

> "If land has been cropped three out of five years during 1980-1986, it shall be deemed to not support a prevalence of hydrophytic vegetation."

This would clearly provide that land which is cropped most of the time is not considered a wetland. Remember, we are attempting to discourage the production of new agriculture commodity on converted wetlands. We are not attempting to stop or prevent normal farming practices on land which most of the time contains no hydrophytic vegetation and is normally cropped.

2. Predominance of Hydric Soils of Wetlands. The rules should list those soils that re classified as hydric for purposes of the rules. By using inclusions in soil map units and various combinations of soils, the result will be both confusion and disagreement. Again, it should be our objective to make the rules clear, definite, and something that the farmers and local SCS people can work with.

3. Definition of Converted Wetland. Converted wetland is defined to mean a wetland that has been "drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose or to have the effect of making the production of an agriculture commodity possible. . . " This broad definition with the use of the term "otherwise manipulated", and specifically including any activity, will have the effect of preventing water-related projects, irrigation, land improvement and conservation measures, recreation, flood control, impoundment for water supply and wildlife, and other related activities, even though such activities may not be physically in the wetland. For example, wildlife interests in North Dakota have argued that irrigation in North Dakota has the affect of

reducing water level in wetlands. Will a farmer be denied benefits if he farms in a wetland, because his neighbor has irrigated and reduced the water level in the wetland. I think you can see that the definition of converted wetland is much too broad. It will result in uncertainty, litigation, and mischief. Every water management activity in North Dakota affects wetlands in some manner. We urge that the definition of converted wetland be limited to activity specifically described in the law. Further, such activity should be specifically required to be within the confines or adjacent area of the wetland, so as not to affect activity which is not in the vicinity and only incidentally affects wetlands. This revision would be helpful not only for farmers but for district conservationists and other Department of Agriculture agencies, and to prevent misinterpretation and distortion.

4. Definition of Person. An issue that arisen in North Dakota because water resource districts, under state law, have the discretion to and are sometimes mandated to construct assessment drains, which provide drainage for an entire assessment area. In the process of constructing an assessment drain, the district builds the principal drainage works and individual farmers construct laterals to connect with the principal drainage works. Several water resource districts in North Dakota have requested that ongoing assessment projects be considered exempt, because several thousands of dollars have been expended in the planning, engineering, design, and preconstruction phases. If those projects are ruled exempt by your agency, it is essential that the entire assessment area be included in the exemption. Otherwise, a farmer who has been and will continue to pay assessments may not be able to receive the benefits of his payments. Whether this issue can be accommodated through a change in the definition of person, or some other additional revision, it is important.

5. Commenced. The law exempts any drainage which commenced before December 23, 1985. The regulations on page 23504, define commenced as "before December 23, 1985, earth moving for the purpose of draining the wetland was actually started, or the person applying for the benefits has legally and financially committed substantial funds by entering into a contract providing for earth moving, or otherwise, for the purpose of converting the wetland." This interpretation is unreasonable, and not consistent with congressional intent. At a meeting on March 12, between representatives of the Department of Agriculture, wildlife interests, and Congressman Dorgan, it was clearly stated that the purpose of Swampbuster was not to stop ongoing projects. Aside from the argument of congressional intent, it is grossly unreasonable to consider that projects which have been underway for several years, and for which several thousands of dollars have been expended, would now be wasted because of the Interim Rules.

The commitment and/or expenditure of any amount of funds should be sufficient to exempt a project from the Wetland Conservation provisions of the 1985 Farm Bill. If the Department of Agriculture, through the Interim Regulations, intends to prevent these ongoing projects from being completed, it should be required to reimburse all expenses that have been incurred. Certainly there would be extensive litigation on the part of districts seeking to recover expended funds.

We urge you to revise this provision of the Interim Regulations, both for reasons of equity and to be consistent with congressional intent.

6. Hydrophytic Vegetation. We would strongly urge that you develop a list of hydrophytic vegetation for each state, rather than have a national list of hydrophytic vegetation. This would allow lists to be reflective of the circumstances and types of vegetation in each state, and would specifically allow more

careful consideration of vegetation which is common to both uplands and wetlands.

7. Appeals. The Interim Rules do not set forth any specific procedure for appeal. We recommend that a consistent method of appeal through local SCS or ASCS committees, to State ASCS or SCS Committees, be spelled out int he regulations for the sake of farmers which will be affected.

8. Inclusions of Hydric Soils, Wet Miscellaneous Areas. We strongly believe that the rules should be limited to the areas identified on the existing soil maps as hydric soils, and not those areas which are not mapped as hydric soils. The provision of the rules that provides that if a soil contains inclusions of hydric soils, potentially wet miscellaneous areas or other potentially wet areas is so broad that it goes far beyond the intent of that tax.

WETLAND EVALUATION STEP BY STEP PROCESS

Wetlands will be evaluated section by section, township by township. As a section is completed it will be recorded on a township plat map or some other similar tool. The team members may work on one township at a time or may work on seperate townships. The area of the county to begin will be determined by the district conservationist.

Step 1: Review soil survey. What to look for:

1. Named hydric map units
   a. Hydric due to 2B2 only
   b. Hydric due to 2B2 and 3
2. Map units with hydric soils as part of their name.
3. Map units with hydric soils as inclusions.
4. Map units with no hydric soils. In most cases these can be eliminated from further review.

Review of the soil survey will provide information on which areas of the section have potential for wetlands. It will also eliminate those portions of fields that will not need further review with other tools.

Step 2: Review NWI maps where available. NWI maps will give a excellent overview of the wetlands in the section. All wetlands on the NWI maps will be considered wetlands for FSA unless review of the ASCS slides does not confirm the wetland. This could happen for the following reasons:

1. Review of the slides for all of the years does not show basins as having water, hydrophytic

vegetaion, drowned out crops or greener crops in in dry years.
2. Wetland has been drained since the NWI photos were taken in 1979.

Step 3: Review ASCS color slides. 5-7 years will be available in most counties. When using ASCS slides, climatological data must also be used. Review the climatological data to keep in mind those years which were above or below normal precipitation 2 to 3 months prior to the date of the slide. The slides where taken in late June or July. In most cases, flights were flown in July.

Place a clear overlay on the caramate screen. Circle the wetlands with a dry erasable marker for the first year reviewed. Go to the next year slide, circle new wetlands and place a check mark by those wetlands that have reoccured. Repeat the process for all the years.

For 5 years of slides:

1 circle, no checks, and wetland is verified by color infrared or NWI map, review weather data to make a dsetermination. *
Both color infrared and NWI must be reviewed. If the area can not be verified by either, area is not a wetland.

1 circle and 1 check and verified by NWI or color infrared, area is a wetland. If area is not verified by color infrared, area is not a wetland.

1 circle and 2 or more checks area is wetland.

If wetland shows up on color infrared but not on any of the ASCS slides, area will not be called a wetland. If area shows up on NWI map but does not show up on any years of the ASCS slides, area is not a wetland.

If, after using this process, the color infrared photograpy is yielding the same results, color infrared may be used in lieu of step 3.

The wetlands will then be transfered to a ASCS 8in/mile map. The wetlands will be circled and labled with a W. Converted wetlands will also be recorded with a CW. Those potholes where drainage activity is evident, but has not totally drained the pothole will be indicated with a Wd. The small "d" will indicate that the pothole has been manipulated and the district conservationist will make the final determination with the person regarding conditions that need to be met concerning the wetland.

*Caution needs to be exercised here. We anticipate this situation should not occur unless the wetland has been manipulated since NWI was flown. If this situation occurs and no manipulation is evident, check weather records to help make the determination. If this situation occurs frequently, we may need to reevaluate this policy.

EFFECT OF "COMMENCED" RULE

Senator BURDICK. For those of you who are representing water interests, how will the "commenced" rule affect the rate and pattern of both water district activity and agriculture development in North Dakota? Please be as specific as possible. Who would like to speak to that first?

Mr. ISSENDORF. The commenced part of it, with our water resource district, if you have a legalized project, the commenced part of it, the fact that we spend, on some of our projects, $60,000 on legal and engineering requirements before we can ever put a drainage project together, that part of the expenditures, we have documented those to our ASCS office, and the problem lies in the fact that some of the wetlands that are in these areas, the Wildlife Society, North Dakota Chapter of the Wildlife Society has sued some of our water resource districts, and prior to the commenced activities, we have valid expenditures for our water resource districts on the commenced end of it.

Senator BURDICK. Does anybody else wish to speak to that point?

Mr. HOETZER. Senator, I would only like to add that usually, when we start a water project in North Dakota, the time from the initial planning stages until final completion is usually 3 to 5 years, so consequently, there were many projects—at least I know of 10, in specific—that were in the planning stages prior to the enactment of the Swampbuster legislation in 1985.

Some of those, because of their process and where they were, had been exempt under provisions of "commenced" of this bill. However, there are others that are still awaiting that determination, and that has not been made on numerous projects in North Dakota. But I think it is the timeframe that it takes us to build them, a major project, and it is usually 3 to 5 years.

Senator BURDICK. Anybody else?

Mr. ISSENDORF. Another item in our part of the country is that when we are talking about a drainage project, you have to realize that we are in a very flat country. I farm in a glacial lake area that is very flat; the topography doesn't vary sometimes more than 2 or 3 feet for many miles. We get a lot of snow. When the snow melts, we are subject to sheet water flooding, which is the essence of a lot of our problems with the type I wetlands.

We need to remove that water because of the time element involved in our farming. We farm right next to the Canadian border. Time is of the essence for our farming operation.

Mr. MERTENS. Senator, also, in the area above Devils Lake, the slant is very shallow, and there have been drainage projects in sheet water. Particularly in a year with late runoff, there are times when the sheet water will flood back over a little knoll or a hill and trap water underneath.

These are traditionally farmed lands and they should in no way be included as wetlands. Where a lateral going to a main drain would alleviate that flooding, time is of the essence. It might make a difference of several weeks in the time in getting it off, it is going to be dry

anyhow. It is whether you can get it over in time whether or not to get a crop on it.

These are the issues we are talking about. I am not sure the Congress ever thought we would be talking about traditionally farmed land. It seems like everybody is talking about bringing new land into production. Here we are, I noticed the other day in "Private Farm," maybe you noticed it too, that they flew in 18 soil specialists from Florida, Oregon, all over the United States to tell the Red River Valley what is a wetland to the farmer. He knows what is a wetland. I know even Senator Burdick, who probably had a farm when he grew up in that area, you know what is a wetland.

I don't think we were talking about traditionally farmed land; we were talking about draining a stool, draining an area that was never traditionally crop acreage, and bringing it in. Why must we have this horrendous battery of federal specialists to decide whether there is a wetland or not on land that has traditionally been in acreage?

There are maps, ASC maps. We received payments for it. It seems that it can be, at least could be simplified to that effect if we didn't talk about land that has been traditionally farmed and we only talked about new land. That would simplify the process tremendously.

Senator BURDICK. Do you believe that the SCS field staff has adequate training to implement Swampbuster? What does this training entail? Do you think they have the expertise at this time?

Mr. PUPPE. The question is whether SCS has adequate training to carry out the provisions of the Swampbuster. I think we can say that the Soil Conservation Service is trying as hard as it can to implement the provisions of Swampbuster, and we are in a situation where that agency has a lot of new personnel, and we are dealing with a situation like you mentioned earlier in our testimony.

The final rules and regulations were published on September 17, 1987. What places a farmer in violation is the planting of the crop. We have only had a few acres of crop planted in North Dakota since September 17, 1987. That is a few acres of winter wheat and a few acres of rye.

But it is going to be the month of April and May before farmers plant, and that is the determining factor. I think then is where we are going to find out how the agency is going to deal with complaints from farmers.

I think the Soil Conservation Service and ASCS are trying very hard, and it is important for them to continue with their educational efforts and making wetland determinations so farmers do know where they stand before they commence planting their crop.

Mr. ISSENDORF. Senator? If I may respond to that, I have asked a lot of my fellow farmers to go to ASCS and get their determinations made. They cannot get in to see our soil conservationist because they are working so much on highly erodible lands, it is down to if you possibly can get in, you will get in by an appointment system only, and a lot of those appointments cannot be filled because they are working so hard on your highly erodible.

I just cannot see how we can enforce violations of Swampbuster until a farmer is notified of what SCS says is the wetland. The farmer's definition of a wetland is totally different than SCS's.

Senator BURDICK. We have heard testimony today that the mapping process will be completed and that we should know the conditions that you refer to by March 15. Is that possible?

Mr. ISSENDORF. Senator, I was at the Red River Valley training session for the SCS people. They brought in a lot of people who had a lot of expertise, but they also have to learn what North Dakota is all about. There were a few people from North Dakota, and they are working as hard as they possibly can, but I do not believe they will get it done by the 15th of March.

Getting it done is one thing. The next thing is taking it to the local SCS and having the meetings with the farmer to tell him what they believe is a wetland on his land. It is not that the farmer is going to sit down there and look at somebody that has drawn the circles on his map and agree with him. He is going to look at that map, and he is going to say, "That's not a wetland; I farmed through that every year. How can it possibly be a wetland?"

The next process that is going to happen is the Soil Conservation Service is going to have to pull out the maps and try and convince that farmer that the people who map these wetlands were correct. That is not going to be an easy process. The farmer definition of a wetland is, "It has got cattails around it and it has got water in it through a prolonged period of time and I can't farm it." Then you have got a wetland, not some little piece of one-tenth or two-tenths of an acre that holds water for maybe 5 or 6 days longer than the other part of his fields. They cannot accept that definition.

Mr. JACOBS. Mr. Chairman, may I respond to your question on staffing? I am a supervisor for the Soil Conservation District in southwest North Dakota. Prior to the implementation of the Food Security Act in our district office, we had three employees. Our district office is 864 square feet, excluding the bathroom. Today, if you went into our office, we have 12 full-time people.

I think due to the influx of that many people in this short a time, I think, efficiency is really dropping. I really think we need an extension of time.

Senator BURDICK. Is it the general consensus of this panel that it is impossible to comply with the mapping by March 15?

Mr. ISSENDORF. I would agree with you that it is impossible to comply with it by the 15th of March.

Senator BURDICK. Thank you for your testimony.

SIERRA CLUB

STATEMENT OF ROBERT WARRICK, CHAIRMAN, AGRICULTURE COMMITTEE

Our next panel is composed of Mr. Wayne Baron, director of the Prairie Wetlands Resource Center, National Wildlife Federation; Mr. Robert Warrick, chairman of the agriculture committee of the Sierra Club; and Mr. William Bryson from the state of Minnesota.

The first witness is Mr. Bob Warrick, chairman of the agriculture committee of the Sierra Club. Mr. Warrick, welcome to the committee.

Mr. WARRICK. Thank you, Senator. You have my written testimony, so I will not read that, but I do want to emphasize a few very important points.

Again, I am a farmer; however, I am not coming from North Dakota. I am coming from Nebraska. I want to make the point that as a farmer and a long-time conservationist, I started out in Soil Water Conservation District. Nebraska now has natural resource districts. I was one of the first chairmen of our area, and so I have a long involvement in the conservation movement.

I also am very pleased to be a member of one of the most effective environmental organizations in the United States, but my point is that as a farmer, I did bring the environmental movement into the farm bill. They did not get involved in that outside of my urging. So if you really want to put some blame on anyone in this whole room for what is happening, you could probably lay it right at my doorstep, because I was the one who really originated the idea of tying conservation to the 1985 farm bill, and it originated long before 1985.

I am very proud of that fact, by the way. I don't think that the 1985 farm bill conservation section, Swampbuster particularly, slipped by Congress. I involved everyone that I could think of, from the Farm Bureau to the Farmers Union to the conservation districts, so to say that suddenly, this idea of a new change in direction in agriculture slipped by Congress and slipped by farmers, farm organizations, is not true.

I tried to get them involved. They ignored it because their long-term concern has been commodity programs, which is probably right. But again, I felt that some of the information being passed out is probably a little misleading; that this was slipped in and no one knew about it. I take exception to that.

Second, as a long-time hunter, I have hunted all my life, and I can find no better pleasure in my life than watching waterfowl and hunting them, also. I have been a long-time member of Ducks Unlimited, and as a hunter, over the years I have hunted, I have watched a steady decline in duck populations migrating through Nebraska. I was disturbed by this. And the only conclusion I can reach is that the production units north of us are not as great as they used to be. I think primarily that is due to the loss of class 1 wetlands. We have practically eliminated class 1 wetlands in the state of Nebraska.

Third, farmers' attitude. I can understand why farmers in North Dakota are concerned. Farmers are reluctant to make great changes. I am reluctant to make great changes. I am very conservative. I call myself a fiscal conservative, and I am certainly an agricultural conservative, so I can understand the new direction of the farm bill and how it upset farmers.

However, I think that the time had come; that the federal government should have asked, should ask, that farmers maybe do practice conservation in return for federal farm payments. That is all we are asking; that is all I have ever intended to ask, and that asking also includes the loss of our wetlands.

I have been in North Dakota. I like North Dakota, and I like the people up there. I certainly had no intention of disrupting North Dakota farmers on this. However, I certainly want to encourage them to protect all their wetlands through this bill. I think it is right that the federal government should ask something in return for federal farm payments.

Finally, I think that through the loss of wetlands in Nebraska, my concern and other farmers' concerns in Nebraska, we got Senator Zorinsky to introduce this Swampbuster legislation in committee. I don't think if it had been for Senator Zorinsky taking the initiative that this would have ever been accomplished, so I think it is a fitting legacy to our late Senator Zorinsky, and I certainly hope that this is not eliminated.

Thank you very much. If there are any questions, I would certainly be pleased to answer them.

Senator BURDICK. Thank you very much.

I think we will save the questioning until all have been heard.

Mr. WARRICK. Sure.

[The statement follows:]

STATEMENT OF ROBERT WARRICK

Mr. Chairman, members of the Subcommittee, my name is Bob Warrick. I am testifying concerning the implementation of the swampbuster program of the Food Security Act of 1985 on behalf of the Sierra Club's 435,000 members. My farm in eastern Nebraska has 250 acres of corn and barley, and 500 acres of pasture. As the Chairman of the Club's Agriculture Committee, I helped develop the conservation provisions which became Title XII of the Food Security Act of 1985, P.L. 99-198. These provisions -- the sodbuster, swampbuster, and conservation reserve programs -- are a historic turning point in the history of federal farm programs. For the first time, these programs discourage, rather than encourage, farmers from plowing, draining, or destroying fragile grassland and wetland resources.

Prior to 1985, farm programs were working well for most farmers in my area. The programs enabled us to survive times of natural disaster or low commodity prices. I participated in the farm program every year since the 1960's because I wanted to support better management of crop surpluses. Unfortunately, there was a small -- but significant -- number of operators who learned to exploit the system and the land. With the support of farm programs, they racked up big profits by plowing out fragile, highly erodible lands or converting wetlands to crop production.

For instance, 91 percent of the 94,000 acres of wetlands in Nebraska's Rainwater Basin have been destroyed, mostly for agricultural production. Only 8460 acres remain, and more than half of these are unprotected. The Rainwater wetlands were predominately Type I wetlands, similar to the prairie potholes of North Dakota. This wetlands destruction caused a drastic decline in waterfowl populations. Scientists estimate that more than 200,000 ducks and geese have died from avian cholera in the last decade, contracted due to the dramatically reduced and overcrowded wetlands habitat in the Rainwater Basin.

The National Wetlands Inventory revealed that the Rainwater Basin is one the wetlands areas most in need of wetlands protection, along with the Prairie Pothole Region of the Dakotas and Minnesota. Statewide, Nebraska has approximately 156,000 acres of wetlands left which have a high or medium potential for conversion to cropland. The wetlands in south-central Nebraska are Type I wetlands, and are threatened by row crop production. These wetlands provide critical habitat for sandhill cranes and white-fronted geese, in addition to recharging critical underground water supplies.

As a long time hiker and hunter, I want to protect Nebraska's -- and other Central Flyway -- wetlands for their habitat, recreation, water supply, and other values. As a farmer who practices good conservation on my own farm, I am tired of competing with other farmers who receive federal tax dollars to drain, fill, or convert wetlands to grow crops which are already in surplus. In February 1985, I met with Nebraska's Senator Edward Zorinsky in Washington, D.C. to try to solve this pressing problem which hurt farmers, taxpayers, and the environment.

Some farmers testified at a field hearing of the Senate Committee on Agriculture in Western Nebraska in April 1985 about this problem, and convinced Sen. Zorinsky that we had to act to stop federally subsidized wetlands conversion. He concluded that wetlands need to be protected like highly erodible land is protected under the sodbuster provision. Farmers and taxpayers could no longer afford to encourage some farmers to engage in costly, destructive wetlands conversion by paying them benefits after they converted wetlands to cropland.

On May 1, 1985, Sen. Zorinsky introduced "The Wetlands Conservation Act of 1985", S. 1051. Sen. Bob Kasten introduced a similar bill, S. 1035, that same day. Then-Rep. Tom Daschle drafted similar legislation in the House of Representatives. Versions of these proposals were included in the farm bills passed by the House and Senate Agriculture Committees, the full House and Senate, and the House-Senate Conference Committee on the Food Security Act.

The swampbuster provision includes numerous exemptions for farmers who farm wetlands during dry years, wet areas created by an irrigation system, and minimal impact conversions. Most importantly, wetlands conversion which commenced before the date of enactment are also exempt from any penalties. Wetlands converted before December 23, 1985 do not jeopardize farm program benefits.

The implementation of the swampbuster program has been slow, and at times, difficult. In Nebraska, the U.S. Department of Agriculture (USDA) has done only a fair job of implementing the program, due to poor publicity about the many exemptions, and to personnel shortages in the Soil Conservation Service (SCS) and the Agriculture Stabilization and Conservation Service (ASCS). Fortunately, as time goes on, much of the initial uncertainty has dissipated. More ASCS and SCS staff would further ease implementation delays.

As of October 1, 1987, the SCS in Nebraska found that 24 farms, with 1090 total acres, undertook some sort of wetlands conversion activity after swampbuster became law. These farmers received a notification from the ASCS that these conversions could jeopardize their program benefits. Most of the farmers did not undertake their planned conversions. Several farmers are in the process of arguing that their conversions are exempt because they commenced before December 23, 1985, and these cases have been settled yet. To my knowledge, not one single farmer has lost farm program benefits due to the swampbuster program in Nebraska. Clearly, the swampbuster provision deterred some farmers from undertaking destructive wetlands conversion to produce more surplus commodities.

I have been a Nebraska farmer for 25 years. Although I often participate in federal farm programs, they are a privilege, not a right. The swampbuster provision simply says to farmers that one of the conditions for receiving the benefits of federal farm programs is that we will be good stewards of the land by not converting our precious, dwindling wetlands to cropland. Swampbuster does not affect anybody's property rights, nor does it penalize farmers for converting wetlands before the Act was passed. Its a law which rewards -- rather than punishes -- farmers who maintain our resources.

As the members of this Subcommittee know, American agriculture is suffering from a deep depression. This depression was largely caused by commodity over production. It is estimated that there is at a year's worth of corn and wheat already in storage. Crop surpluses are depressing farm income and crop prices, causing farm program payments to skyrocket. In 1987, farm programs cost $26 BILLION -- more than 10 percent of the budget deficit. $750 million went to North Dakota farmers alone.

Paying farm program benefits to farmers who convert wetlands to cropland exacerbates both the oversupply and deficit problems, which will only make things worse for farmers in the long run. Adding more exemptions to the swampbuster program will only lead to more overproduction, which will further depress farm prices and income. And on and on it will go.

I understand that many North Dakota farmers are upset about the swampbuster provision, partly because it is a new approach for farm programs. The program was created barely two years ago, and the regulations implementing the program were just finalized last fall. Let's give the program time to work before Congress creates more exemptions. Rather than open loopholes in this new law, Congress should provide enough resources so that the SCS and ASCS have the field people needed to thoroughly explain and implement it. Congress must also make sure that USDA is doing a good job of educating farmers on our new responsibilities, as education is critical to full understanding and implementation of the program.

The conversion of Nebraska's irreplaceable Rainwater Basin wetlands to agriculture was a travesty which harmed farmers as well as the environment. Let's not destroy other precious resources such as prairie potholes and other Type I wetlands in order to produce more commodities that we don't need. The swampbuster program is a fitting legacy to one of its authors, Sen. Ed Zorinsky. We strongly urge you to oppose eliminating Type I wetlands from the swampbuster program, and to oppose other changes to the swampbuster and other conservation provisions of the Food Security Act.

Thank you for this opportunity to testify. I would be happy to answer any questions.

NATIONAL WILDLIFE FEDERATION

STATEMENT OF WAYNE BARON, DIRECTOR, PRAIRIE WETLANDS RESOURCE CENTER

Senator BURDICK. The next witness is Mr. Wayne Baron, Director of the Prairie Wetlands Resource Center, National Wildlife Federation.

Mr. BARON. Senator Burdick, Mr. Chairman, my name is Wayne Baron, and I am the director of the National Wildlife Federation Chapter in Bismarck. The National Wildlife Federation represents 4.8 million members who are concerned about wetland destruction.

We appreciate the opportunity to testify today. The National Wildlife Federation was founded 50 years ago. One of the primary reasons for our founding was the dramatic decline of wetlands and waterfowl populations during the 1930's. A half a century later, we are still facing unacceptable losses of both resources. This decline must be addressed.

Last year, the National Wildlife Federation opened a Prairie Wetland Resource Center in Bismarck because that State of the Union plays such a major role in the health and viability of our continental waterfowl populations. In 1985, we lobbied for passage of Swampbuster for this reason and because 80 percent of all wetland destruction is caused by agricultural conversion.

Effective enforcement of Swampbuster provisions is necessary to halt this trend. What happens to North Dakota wetlands directly affects most of America's waterfowl and conservationists. We call the prairie pothole region America's duck factory with good reason: Prairie potholes are the most valuable inland marshes for waterfowl production in North America. Waterfowl species in North Dakota have been found in 46 other states, 10 Canadian provinces, and 23 other countries. Thus, wetland conversion in North Dakota is far from a parochial problem. The waterfowl interests of the entire continent are at stake.

I want to put today's discussions in perspective. Sixty percent of the wetlands in North Dakota have already been destroyed. Today, we are discussing what to do with the remaining 40 percent. Ninety-three percent of these remaining wetlands in the prairies are in private ownership and are vulnerable to destruction.

In 1985, waterfowl populations dropped to their lowest level in recorded history and have yet to recover today. This decline is directly attributable to habitat loss. We have heard a lot of testimony advocating removal of so-called type I wetlands from Swampbuster. However, we have not heard anyone explain the disastrous effect on wildlife of such an action.

Removing type I wetlands or any other wetlands would be a critical mistake. Each type of wetland plays an integral part in waterfowl production. For example, smaller, shallow wetlands thaw early in the spring and provide food that is critical early in the breeding season. Also, these wetlands are smaller and more spread out, reducing the threat of disease that occurs due to overcrowding on a shrinking habitat.

Less permanent wetlands, including type I's, make up 35 percent of the wetlands in North Dakota. Yet they produce, in some years, over 57 percent of the breeding population. Type I wetlands may not always appear to the untrained eye to be wetlands because they are flooded during only part of the year. However, they meet the Swampbuster's definition of wetland.

Their protection from agricultural conversion was a major reason why the National Wildlife Federation supported Swampbuster. With so little habitat remaining and with waterfowl populations in such bad shape, we cannot afford to destroy any type of wetlands that remain.

Wildlife alone is far from the only value provided by prairie wetlands. Flooding is a substantial problem in North Dakota, especially for agriculture. Scientific studies have demonstrated that these wetlands play a substantial role in reducing the damage from flooding because they store excess waters and slowly release them over a gradual period of time. When these wetlands are gone, the water has nowhere else to go but on our farms, homes, and other property.

The flood control values of wetlands were recently recognized by South Dakota's Governor Nicholson, when he endorsed a proposal to pursue restoration of 26,000 acres of wetlands for flood control.

Prairie potholes also play a role in recharging North Dakota's ground water aquifers. One study demonstrated that 213 wetlands in a 1,600-acre area produced minimal ground water recharges to supply enough water for 1,700 head of cattle for 1 year.

Swampbuster should play a major role in conserving these wetlands from agricultural conversion, but it has not done that. Instead, wetland conversion has increased since the act was passed. Worse, numerous violations have been brought to the attention of ASCS; yet not one producer has been declared ineligible for farm program benefits in the entire state.

This situation results directly from ASCS's disorganized approach to Swampbuster. ASCS has failed to provide objective information to farmers about Swampbuster as well as ASCS's reluctance to interpret and enforce Swampbuster in North Dakota has rendered the act ineffective.

However, we see signs of improvement. As we speak, SCS is mapping wetlands in the Red River Valley to provide farmers with objective information about the location of wetlands on their property. Also, ASCS, SCS, and Fish and Wildlife Service are developing procedures for cooperation in obtaining information on wetland designations, prospective violations and the act's exemptions.

In contrast to North Dakota, there is substantial interagency cooperation in neighboring Minnesota. Also, SCS has made a concerted effort to provide wetland delineations for farmers in that state. Indeed, Minnesota accounts for over two-thirds of all Swampbuster wetland determinations in the entire country. It is ironic that North Dakota farmers have been loudest in crying wolf on Swampbuster in the state where the act has hardly even been implemented, yet no such opposition has surfaced in Minnesota and other states.

Therefore, we believe that a sound administrative program of interagency cooperation and public information will go a long way toward diffusing farmer opposition in North Dakota.

This subcommittee should be pressing USDA officials to make Swampbuster effective in North Dakota rather than considering ways to reduce the statute's coverage. The arguments for excluding type I wetlands are unconvincing and unsound. According to some agricultural interests, type I wetlands, consistently referred to as wet spots, are nuisances.

They argue that Swampbuster is unacceptable because it forces them to keep those areas on their land at the threat of losing their subsidies.

However, in reality, Swampbuster allows them to drain these areas if they are really a nuisance, as long as no agricultural commodity is planted on it. Conversely, the farmer can plow and plant the wetland in drier times and receive benefits as long as he does not drain the wetland. Indeed, Swampbuster provides a way to have both wildlife values and farming.

To remove Swampbuster's protection from seasonal wetlands gives us only farmimg and no wildlife. Therefore, opposition to Swampbuster either stems from lack of understanding of its provisions or the desire to simply increase production at the expense of wetlands.

Lack of understanding of the act is a problem that is easily resolved. However, increased agricultural production at the expense of wetlands was exactly the problem Swampbuster was intended to remedy. What is appropriate for the expenditure of federal tax dollars in North Dakota should be determined by the taxpayers, not the tax spenders.

Before excluding any wetlands from Swampbuster, we should step back and recall why Congress passed the statute:

One, there is a surplus of agricultural production in this country, according to the House Committee on Agriculture;

Two, wetlands are an important resource being destroyed at the rate of at least 400,000 acres per year; and

Three, the federal budget deficit speaks for itself.

The American taxpayer does not want to subsidize the destruction of one resource that is getting scarcer every year—wetlands—in order to create another resource that we already have too much of—agricultural production. Without an effective Swampbuster, the budget deficit feeds on the destruction of wetlands that produce waterfowl, flood control, and ground water recharge.

The same is true if Swampbuster's coverage is reduced to exclude type I wetlands, for example. Only the individual farmer will obtain short-term benefits from reduction of Swampbuster's coverage.

Everyone else, including those who foot the bill for the federal budget, will lose. Such a move is clearly out of step from the prevailing fiscal, environmental mood of the country.

[The statement follows:]

Statement of Wayne Baron

On December 23, 1985 Congress took a dramatic and much-needed step, effectively declaring that America's taxpayers would no longer fuel the destruction of wetlands through agricultural subsidies. Congress understood that subsidizing wetlands destruction is inconsistent with well-established national policy to protect our valuable but declining wetlands resources.[1] It simply makes no sense to encourage agricultural conversion of wetlands through a policy adding further burdens to the national debt.

More than two years have passed since passage of "Swampbuster" provisions of the Food Security Act of 1985, yet enforcement of these provisions remains largely nonexistent. The pace of agricultural conversion of wetlands has not slowed appreciably since Swampbuster was passed, and only two producers in the entire United States have lost eligibility for benefits under the Act, to our knowledge. Despite this dismal record, farmers, farm groups and their elected officials are now calling for dramatic reduction of Swampbuster's coverage.

This opposition seems to be restricted to the State of North Dakota, a state in which Swampbuster could potentially protect thousands of acres of valuable wetlands. These wetlands have a truly national and international value as breeding areas for migratory waterfowl, and provide farmers important flood control and groundwater recharge benefits. Yet, agricultural conversion of wetlands in that state has actually increased since Swampbuster's passage. Not one producer in the state has lost program eligibility due to Swampbuster.

The application of Swampbuster is inconsistent and ineffective for two reasons: (1) lack of enthusiasm for enforcement of the law within the U.S. Department of Agriculture (USDA), and (2) political pressure on USDA to refrain from enforcing the Act.

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[1]For example, Section 404 of the Clean Water Act, 33 USC 1344; the Emergency Wetlands Resources Act, Pub. L. No. 99-645.

We are concerned that Swampbuster is not working and that, not only farmers, but officials within USDA as well, are attempting to use these hearings, and others that may be contemplated, to reduce Swampbuster's scope without amending the law.

In order for Swampbuster to protect wetlands effectively, it must be implemented in a comprehensive, uniform manner. Indeed, nonexistent enforcement of Swampbuster will only exacerbate agricultural economic problems because it puts the honest, law-abiding farmer at a competitive disadvantage with the farmer who drains wetlands for crop production and continues to receive subsidies.

The National Wildlife Federation joined other conservation and farm organizations in lobbying vigorously for enactment of Swampbuster because the legislation is needed, makes sense, and is amply justified. Congress should not second-guess itself until the law has had an opportunity to work.

WHY CONGRESS PASSED SWAMPBUSTER

Congress adopted Swampbuster to address the massive destruction of wetlands resulting from agricultural drainage. In reporting the 1985 Farm Bill the House Committee on Agriculture, recited facts beyond dispute: wetlands are valuable for wildlife habitat, aquaculture, flood control, water purification, groundwater recharge, and recreation. H.R. Rep. No. 99-271, 99th Cong., 1st Sess. 86-87 (1985). The Committee described the problem facing Congress and the Nation:

> Currently, wetlands are being destroyed at a rate that is environmentally unacceptable .... [N]early 14.7 million acres of freshwater wetlands and approximately 500,000 acres of saltwater wetlands have been destroyed from the mid-1950 to the mid-1970s.
>
> Much of the wetlands lost in recent years can be attributable to conversion to agricultural uses. At the present time of surplus agricultural production there is certainly no need for the conversion of more resources into agricultural production especially when those wetlands resources have

> such inherent value and provide such practical benefits as discussed above.

Id. The House Committee was well advised to express this concern because in 1984 Congress' Office of Technology Assessment estimated that 80 percent of all freshwater wetland destruction resulted from agricultural conversion. Office of Technology Assessment, Wetlands: Their Use and Regulation 108 (1984).

This Subcommittee need not take the National Wildlife Federation's word for the need for Swampbuster. The Congress addressed the issue and in 1985 concluded that subsidized agricultural conversion of wetlands is bad fiscal and environmental policy in this day and age of surplus agricultural production, fiscal responsibility, and conservation awareness.

Moreover, nothing has changed about wetlands destruction since Congress passed Swampbuster. The U.S. Fish and Wildlife Service (FWS) has estimated an annual average loss of 458,000 acres of wetlands between 1955 and 1975. U.S. Fish and Wildlife Service, Wetlands of the United States: Current Status and Recent Trends 31 (1984) ("Wetlands Status and Trends"). There is no evidence to suggest the trend has slowed. Therefore, the only difference between today and the passage of Swampbuster in 1985 is the loss of an additional 900,000 acres of wetlands.

THE IMPLEMENTATION OF SWAMPBUSTER

When Congress enacted Swampbuster in 1985, it directed the Secretary of Agriculture to promulgate regulations by June, 1986. 16 USC 3844. To meet that deadline, USDA published "interim" regulations, 51 Fed. Reg. 23496 (June 27, 1986), which were then supplemented by guidance in field manuals and oral communications to local officials in the Agricultural Stabilization and Conservation Service (ASCS) and Soil Conservation Service (SCS) charged with administering the law.

Farmers learned early in 1986 that they had to certify any drainage plans on USDA forms (AD-1026) in order to receive federal farm benefits. At the same time, local ASCS

and SCS personnel were put in the position of requiring compliance from farmers whom they had assisted with voluntary programs before. Neither the newly-appointed "regulators" nor the regulated agricultural community were happy in their new roles and tended to give the new law little attention.

Political pressure to weaken the Act was translated into field guidance which interpreted the vague interim rules to exempt significant wetland conversion from the impact of the law. Where the law could not be side-stepped through interpretation, it was simply ignored by local officials and farmers. This open disdain for Swampbuster implementation was, and continues to be, most apparent in the prairie pothole states.

Because the interim rules were viewed as temporary, USDA staff in Washington, D.C. focused immediately on developing final rules. In the meantime, local ASCS and SCS officials, themselves members of the local agricultural community, were able to enforce Swampbuster or ignore it as they saw fit. Consequently, implementation during the 1986 and 1987 growing seasons was extremely variable, and generally lax.

This picture of administrative inertia changed superficially when the Final Rules were published in September, 1987. 52 Fed. Reg. 35194 (Sept. 17, 1987). These rules were the product of considerable inter-agency haggling among ASCS, SCS, FWS, the Office of Management and Budget, and, to some extent, the Environmental Protection Agency (EPA). Conservation groups, including the National Wildlife Federation, supported FWS in pushing for strong final rules. The final rules were detailed and more stringent, and seemed to send a signal that USDA head quarters genuinely intended to implement Swampbuster, that the law was here to stay, and the field representatives and the agricultural community should obey the law.

Since issuance of the final rules, SCS and ASCS seem to have made a concerted effort to provide uniform training to their field personnel in Swampbuster implementation. We believe this training has reinforced the strong message sent by the final rules. This training had been received by state-level officials. The agencies are relying upon those

state officials, in turn, to train county-level staff. The speed and effectiveness of such trickle-down training will be a critical factor in assessing Swampbuster implementation over the next few years.

SWAMPBUSTER ADMINSTRATION TO DATE

The real test of Swampbuster's effectiveness will come during the 1988 and future growing seasons. The record so far looks dismal. Though ASCS and SCS have not accumulated any records or statistics evaluating the program, the available information is disturbing.

Wildlife professionals and local landowners have documented increased wetland drainage throughout North Dakota, South Dakota, and Minnesota during 1987. Drainage proponents have admitted that drainage this year has increased.

In South Dakota, over 272 potential Swampbuster violations have been reported yet no benefits have been withheld. In Minnesota, SCS personnel admit to nearly potential 3,000 violations but, to our knowledge, only one producer in the state has had benefits withheld under Swampbuster.

The Swampbuster record is decidedly mixed at this point. However, with time, USDA support, and objective educational efforts, Swampbuster can be a success. A more detailed regional view of Swampbuster administration follows.

Minnesota

However, we believe that Minnesota is on the road to becoming a model for a successful Swampbuster program despite the fact SCS personnel admit that nearly 3,000 potential Swampbuster violations have occurred and only one Minnesota farmer has lost benefits, one of only two farmers in the nation to have been penalized since Swampbuster was enacted.[2]

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[2] To our knowledge, only two producers have been sanctioned under Swampbuster, one in Minnesota and one in Georgia.

During 1987, Swampbuster enforcement in Minnesota improved slightly due to increased coordination between ASCS, SCS, and FWS. In the Spring of 1987, the FWS regional and state Swampbuster coordinators began documenting potential violations and administrative gaps in Minnesota and began working to resolve them.

This effort has resulted in substantial, positive changes in the program. ASCS has agreed to forward all information received from farmers indicating potential wetland drainage so the SCS can determine whether the area in question meets Swampbuster's definition of "wetland." Previously, ASCS county offices were advising farmers that effects on wet areas need not be reported, and many wetlands were drained without an SCS wetland determination.

ASCS also agreed to consult with FWS at the county and state levels on all determinations regarding two Swampbuster exemptions--actions commenced before the effective date of the Act, and third-party drainage. See 16 USC 3822(a)(1) (commencement); 52 Fed. Reg. 335203 (third party). The final USDA regulations do not expressly require consultation at the critically important county level, where the ASCS determination of exemption is actually made. 52 Fed. Reg. 35204, to be codified at 7 CFR 12.6(b)(3)(viii) & (ix). Commencement determinations are particularly critical because they provide the broadest exemption from Swampbuster sanctions. This change should result in more efficient, more consistent, and more justifiable determinations by ASCS county committees.

SCS agreed to consult with FWS at the district, area, and state levels on controversial wetland determinations and determinations under the "minimal effect" exemption. 16 USC 3822(c). Again, these determinations are critical to whether a given wetland is protected by Swampbuster, and FWS consultation at the local level should result in increased wetland protection.

Finally, SCS district offices in Minnesota made over 12,000 Swampbuster wetland delineations in Fiscal Year 1987, all of which were referred to them by ASCS through the Form AD-1026 Certification process. According to FWS, this figure

represents over two-thirds of all such wetland determinations made nationwide.

We strongly support these efforts and changes in the program's administration in Minnesota. National Wildlife Federation commends USDA's willingness to cooperate in making Swampbuster more effective.

North Dakota

Swampbuster has been a failure in North Dakota, primarily due to pressure from drainage proponents. In North Dakota, enforcement ranges from ineffective to non-existent, while wetland drainage has escalated. This accelerated drainage has resulted from antagonism of farmers toward Swampbuster. Some farmers are draining wetlands now for fear that someday Swampbuster will be effective in North Dakota.

In November, 1987, North Dakota Congressman Byron Dorgan held meetings in North Dakota to discuss Swampbuster. At these meetings, farmers and farm organizations turned out in large numbers and expressed heated antagonism toward having federal officials (ASCS, SCS, and FWS) "looking over their shoulders" and having a say in what owners do on their land (even though they are doing it with federal taxpayer's assistance). These groups also expressed frustration over ASCS and SCS delays and inconsistencies in implementation. These frustrations are shared by the conservation community.

A primary goal of the farm groups in North Dakota is to exempt seasonally flooded potholes from Swampbuster sanctions. Position Paper of North Dakota Farmers Union, et al. 1987. Other measures have been proposed which essentially would eliminate Swampbuster sanctions for conversion of prairie potholes. Id. The reaction of ASCS and SCS personnel to this type of pressure has been to compromise on enforcement, if not ignore it altogether, on the premise that strict enforcement will result in pressure to amend or repeal the law.

There is, in fact, no enforcement of Swampbuster in North Dakota. While FWS alone reported over 150 potential Swampbuster violations to North Dakota local ASCS offices in

1987, ASCS acknowledges receipt of only 83 reports from all sources, including neighboring farmers. Although at least 23 ASCS county offices received reports of potential violations, only three made any attempt to field check reported violations. In four counties and at least 15 instances, ASCS contacted farmers with potential violations and were told the work was simply to clean out existing drains. These ASCS county offices have not field checked any of these drains, apparently accepting the producer's determination at face value.

No federal farm benefits have been withheld under Swampbuster in North Dakota. In fact farmers in North Dakota collected $450 million in federal agricultural subsidies in 1987. The one reported finding of noncompliance in North Dakota did not result in the withholding of farm benefits. Instead, the producer was notified, the drain was closed, and the crop planted on the wetland was destroyed.

Indeed, ASCS has seriously pursued only two other reported potential violations in North Dakota, both of which demonstrate ASCS's abuse of the commencement exemption.[3] In both cases, the farmers had drained wetlands and planted commodity crops on wetlands after December 23, 1985, the effective date of the statute. The USDA regulations require that commencement must consist of actual movement of dirt to manipulate the hydrologic regime in a wetland or a substantial financial obligation to do the same by entering into contracts for work or purchase of construction materials before passage of the Act.[4]

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[3] Swampbuster exempts farmers from sanctions for production of commodity crops "on converted wetland if the conversion of such wetland was commenced before December 23, 1985." 16 USC 3822(a)(1).

[4] USDA regulations provide, in essence, that "commencement" must consist of activities such as draining, filling, dredging, leveling, or otherwise manipulating wetlands to make it possible to produce agricultural commodities therein. These activities must have actually started before December 23, 1985, or a contract for such work must have been entered or construction supplies purchased by such date. 52 Fed. Reg. 35201 and 35203, to be codified at 7 CFR 12.2(a)(6) and 12.5(d)(1)(vi) and (2)-(3).

In these two cases, ASCS allowed the exemption even though the producers lacked actual documentation that earth moving had started before December 23, 1985 or that a contract to do such work was entered by that date, despite the requirements of USDA regulations. One farmer admitted to ASCS personnel that no dirt was moved, no contract to move dirt was entered, and no substantial funds were committed for such work before December 23, 1985. The ASCS State Director has acknowledged that the county committee's initial determinations that these two farmers met the exemption were improper. Nonetheless, the State Director upheld the exemption and refused to declare the producers ineligible. Thus the only two potential violations in North Dakota given any sort of review led to no sanctions.

In sum, Swampbuster enforcement in the prairie pothole states has been lax, but shows some sign of improvement, particularly in Minnesota. Whether Swampbuster becomes a reality in North Dakota will depend on whether Congress and ASCS and SCS in Washington, D.C stand firm in signaling their commitment to strict Swampbuster enforcement in 1988. Without such a commitment, supported by diligent oversight, farmers and ASCS county committees are likely to continue to ignore the law and press for its repeal. The taxpayer will continue to subsidize the destruction of some of the most valuable wetlands in our Nation.

Swampbuster has not stimulated the reaction in Minnesota and South Dakota that has erupted in North Dakota. This suggests that farmers in North Dakota are overreacting to a program not yet in effect there. A positive program of providing objective, accurate information to farmers coupled with efficient administration is critical to farmer acceptance of Swampbuster. A program in North Dakota similar to the one in Minnesota would help overcome farmer resistance. Legislative oversight of Swampbuster should concentrate on USDA's willingness and ability to provide such assistance at this important point in the program.

The Lower Mississippi River Valley

Swampbuster administration in the Lower Mississippi River Valley has been mixed. FWS coordination with ASCS on

commencement determinations and with SCS on minimal effect determinations has improved with issuance of the final rules. However, ASCS and SCS have declined to report and follow up on potential violations.

On the positive side, there have been at least two substantial bottomland clearing operations in Louisiana proposed or begun by corporate entities which appear to have been stopped to avoid loss of commodity payments. In both these cases, FWS made determinations that the operations would convert wetlands covered by Swampbuster, and the clearing plans were dropped, at least temporarily.

Other Wetlands

The remaining wetlands most vulnerable to agricultural conversion are palustrine (upland, generally fresh water) wetlands in private ownership. According to the 1982 Natural Resources Inventory (NRI) conducted by SCS, approximately 80% of wetlands not federally protected are privately owned. Heimlich & Langner, "Swampbusting in Perspective," 41 Journ. of Soil & Water Conservation (No. 4) 219 (1986) ("Swampbusting in Perspective"). Of the 70.7 million acres of non-federal palustrine wetlands, the 1982 NRI rated 5.1 million acres as having a moderate to high potential for conversion to cropland in 1982. About 85 percent of these high potential wetland conversions could be easily brought into production. Id.

Approximately 16 million acres of wetlands remaining in 1982 would have earned short-term positive returns if converted, assuming 1985 crop prices and subsidy program participation rates. Heimlich & Langner, "Swampbusting: Wetland Conversion and Farm Programs," USDA Ag. Econ. Rep. No. 551 (1986); Swampbusting in Perspective, pp. 220-221. Therefore, the 5.1 million acre estimate of wetlands vulnerable to agricultural conversion actually may represent the low end of the range.

In 1984 FWS identified nine types of wetlands in the United States "that are in greatest jeopardy from a national standpoint." Wetlands Status and Trends, pp. 35-36. According to a USDA economic study, agricultural conversion

is a major threat to six of these nine types, including the palustrine wetlands of South Florida, the Nebraska Sandhills and Rainwater Basin, the pocosins of the North Carolina coastal plain, and western riparian wetlands, as well as the prairie potholes and the Lower Mississippi River bottomlands. Swampbusting in Perspective, pp. 223-224.

South Florida's palustrine wetlands provide freshwater run-off which maintains the salinity balance in coastal estuaries supporting 85 percent of Florida's off-shore fishery. Wetlands Status and Trends, pp. 40-41. These wetlands also provide breeding and wintering habitat for many bird species, and support a number of endangered species. Id. Agricultural conversion and projects to protect agricultural land from floods have been major factors in past wetland conversion. Id. Approximately 382,500 wetland acres, about 8.5 percent of the 4.5 million acres of non-federal wetlands in this area, were rated in the 1982 NRI as having a moderate to high potential for conversion. Swampbusting in Perspective, p. 223.

Nebraska's Sandhills and Rainwater Basin areas are migration stopovers critical for waterfowl and sandhill cranes in the Central Flyway. Wetlands Status and Trends, pp. 46-48. Agricultural conversion and irrigation-related wetland losses have concentrated migratory birds in remaining wetlands, resulting in increased disease. Id. About 128,850 wetland acres are estimated to have a moderate to high potential for conversion in this area. Swampbusting in Perspective, p. 223.

The North Carolina pocosin wetlands are principal groundwater recharge areas, and, like the South Florida wetlands, provide fresh water run-off essential to maintaining the salinity balance of the coastal estuaries. These wetlands also provide important wildlife habitat. Wetlands Status and Trends, pp. 49-50. The SCS has estimated that about 380,000 acres of pocosin wetlands in North Carolina have a moderate to high potential for agricultural conversion. However, conversion may be profitable on a much larger acreage due to economies of scale in large-scale wetland conversions. Swampbusting in Perspective, pp. 223.

The western riparian wetlands provide important food and cover for resident and migratory species of fish and wildlife in what are otherwise arid regions. Wetlands Status and Trends, pp. 50-51. These areas have been reduced significantly, in part due to agricultural conversion. Id. About 35,000 wetland acres in this area have a moderate to high conversion potential. Swampbusting in Perspective, pp. 223-224.

National Wildlife Federation is extremely concerned that any signs of weakness in Swampbuster enforcement in the prairie states will stimulate agricultural conversion in these other important wetland areas. If Swampbuster is rendered a dead letter in the prairie states there is little reason to believe that it will be any easier to enforce in any other states. This will be especially true if Congress shows a lack of resolve to support existing legislation.

THE BATTLE OVER TYPE I WETLANDS

The effort to reduce Swampbuster's coverage has focused on the wetland definition, and, in particular, the inclusion of temporary or seasonal wetlands. Three farm groups in North Dakota have expressly advocated elimination of these wetlands from Swampbuster. However, these are some of our most valuable wetlands.

These wetlands are referred to as "Type 1" wetlands because they have been classified in this way in an FWS document ("Circular 39").[5] Circular 39 describes Type 1 wetlands as

> **Seasonally flooded basins or flats** .... The soil is covered with water, or is waterlogged, during variable seasonal periods but usually is well drained during much of the growing season.

FWS, Wetlands of the United States 20 (1971) ("Circular 39").

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[5] Circular 39 is an FWS publication entitled "Wetlands of the United States" first issued in 1956 and republished in 1971. Circular 39 has been updated by FWS' "Classification of Wetlands and Deepwater Habitats of the United States," published in 1979. Despite its venerability, the classification concepts in Circular 39 remain valid.

Type 1 wetlands may not always appear to the untrained eye to be wetlands because they are usually flooded only during part of the year. They may be dry during most parts of the year, and all year during dry years. Nonetheless, they meet the definition of "wetland" in Swampbuster and their protection from agricultural conversion was a major reason why the National Wildlife Federation supported the passage of Swampbuster.

Type I Wetlands Are Being Destroyed

Congress was well advised to ensure that Type 1 wetlands were included in Swampbuster because these wetlands have been severely depleted by agricultural conversion and remain significantly threatened by this conversion. Originally, the prairie pothole region of the Dakotas and Minnesota had 17 million acres of prairie wetlands. According to FWS's National Wetlands Inventory, only 5.3 million acres remain today. North and South Dakota have lost 60 percent and 35 percent of their prairie wetlands, respectively. Most of this destruction was conversion to farming. Wetland Status and Trends, p. 42. Prairie pothole destruction continues today at the rate of 33,000 acres per year. Id. Type 1 wetlands are 18 percent of remaining United States prairie wetlands acreage, totalling nearly one million acres. U.S. Fish & Wildlife Service, "Wetland Resource North Dakota" (unpub.).

About eighty percent of the remaining wetlands in these three states are in private ownership, according to the National Wetlands Inventory. Twelve percent of the 4.9 million non-federal wetland acres in the prairie potholes of the Dakotas and Minnesota, or about 588,000 acres, have a moderate to high potential for conversion to agriculture. Swampbusting in Perspective, p. 223. Given the vulnerability of these wetlands to conversion, and the high rate of farm program participation in these states, Swampbuster must play a significant role in reducing the rate of prairie wetland loss, and conserving the soil, water, and wildlife resources associated with them.

Type I Wetlands Are Included in Swampbuster

Swampbuster defines a wetland as

> land that has a predominance of hydric soils and that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions.

16 USC 3801(a)(16). This is virtually the same definition of wetlands employed by the U.S. Army Corps of Engineers and the Environmental Protection Agency in administering Section 404 of the Clean Water Act.[6] See 33 CFR 328.3(b)(1987) (Corps definition); 40 CFR 230.3(t)(1986) (EPA definition).

This definition, like the one used in Section 404, focuses on three components: water, hydric soils, and hydrophytic vegetation. See U.S. Army Corps of Engineers, Multiparameter Approach for the Identification and Delineation of Wetlands (1986). The presence of water is obviously the key component for wetlands delineation but it is unrealistic to assume that water must be present year-round to create a wetland. As the House Merchant Marine and Fisheries Committee Swampbuster Report notes: "The single feature that most wetlands share is soil or substrate that is <u>at least periodically</u> saturated with or covered by water." H.R. Rep. No. 99-271, Part 2, 99th Cong., 1st Sess. 16 (1985) [emphasis added]. (This report is significant because the House Committee's version of the wetland definition ultimately became part of Swampbuster.)

This point is also demonstrated by Swampbuster's definitions of "hydric soils" and "hydrophytic vegetation."

The Act defines "hydric soil" as

> soil that, in its undrained condition, is saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation.

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[6] Certain wetlands in Alaska are expressly excluded by Swampbuster but are not excluded from the Corps' and EPA's definitions of wetlands. 16 USC 3801(a)(16).

16 USC 3801(a)(8). "Hydrophytic vegetation" is defined by Swampbuster to mean

> a plant growing in (A) water; or (B) a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content.

16 USC 3801(a)(9).

According to these definitions, water needs to be present only for a duration sufficient to create "anaerobic conditions" or an oxygen deficiency during all or part of the growing season. To constitute a wetland the soils must hold water long enough to deprive the plants of oxygen in the root zone during the growing season so that only plants that can tolerate such saturation, the "hydrophytic vegetation," can survive and outcompete species of vegetation that cannot do so. Congress' recognition of this phenomenon is reflected in the House Report: "The water creates severe physiological problems for all plants and animals except those that are adapted for life in water or saturated soil." H.R. Rep. No. 99-271, Part 2, 99th Cong., 1st Sess. 16 (1985); see 40 CFR 230.41(a)(3) (EPA regulation describing "wetlands vegetation").

Type 1 wetlands such as prairie potholes and bottomland hardwoods meet this definition because they are seasonally flooded or saturated during the growing season, although they may be dry during other parts of the year. By literal application of the terms of the statute, Type 1 wetlands are included in Swampbuster. Only by amending Swampbuster can these wetlands be exempted from the Act's protection.

Congress Intended to Include Type I Wetlands

The legislative history demonstrates that Congress fully intended that Type I wetlands be subject to Swampbuster sanctions. The House Merchant Marine and Fisheries Committee Report refers explicitly to "prairie potholes" and, indeed, uses FWS' experience with wetlands in the prairie pothole states as a model for the legislation. H.R. Rep. No. 99-271,

Part 2, 99th Cong., 1st Sess. 16 (1985). Congress' recognition that seasonally flooded prairie potholes are wetlands is also reflected in the express statutory language permitting cultivation of seasonally dry wetlands when this operation is feasible without the need for draining. 16 USC 3801(a)(1)(B).[7] As explained by the House Report,

> During the wetter years, these potholes will exhibit true wetland characteristics and will again provide valuable wetland functions and producers who convert these wetlands in such years shall be denied farm program benefits.

Id. at 16-17.

By definition Type 1 wetlands are seasonally flooded or saturated, and not permanently flooded or dry. Congress recognized the importance of protecting these, and all other wetlands, in their most valuable, that is, natural state: "[T]he purpose of the Act [is] to discourage destruction of wetlands as they naturally exist." Id. at 17 [emphasis added].

The law as it stands today includes Type 1 wetlands even although to some they may not appear to be wetlands at certain times of the year or during certain years. These wetlands cannot be excluded from Swampbuster without amending the Act. To exclude these wetlands through the expedient of nonenforcement violates the law as passed by Congress.

Swampbuster Should Protect Type I Wetlands

Swampbuster can be implemented according to Congress' intent, and protect Type I wetlands at the same time. Even now, progress is being made. For example, ASCS, SCS, and FWS state and regional officials met in November, 1987 and agreed to some of the same inter-agency procedures in North and South Dakota which have been applied in Minnesota. The

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[7] "Wetland shall not be considered converted wetland if production of an agricultural commodity on such land during a crop year--(i) is possible as a result of natural condition, such as drought; and (ii) is not assisted by an action of the producer that destroys natural wetland characteristics."

Swampbuster training and field guidance finally being provided by USDA nationally should also reduce farmer frustration by making administration more consistent and efficient.

In addition, SCS has sent a team of professionals to North Dakota in January, 1988 to identify all of the wetlands in the Red River Valley, an area in which there is considerable frustration and controversy over Swampbuster. We support this comprehensive wetland delineation effort which should reduce delays, uncertainties, and frustrations with Swampbuster in eastern North Dakota.

THE VALUE OF PRAIRIE WETLANDS

These wetlands were included in Swampbuster for good reason. They are extremely valuable. Indeed, of all the wetlands in the country, the northern plains prairie potholes are perhaps the most deserving of federal protection for their role in waterfowl production as well as a variety of important hydrological functions.

Waterfowl Production

Prairie potholes represent America's duck factory: "Prairie potholes are the most valuable inland marshes for waterfowl production in North America." Wetlands Status and Trends, p. 42. While the Prairie Pothole Region comprises only 10% of North America's waterfowl breeding area, it produces 50% or more of the continent's ducks. Id.[8] About 87% of the ducks bred in the lower 48 states breed in the Dakotas, Minnesota, and Montana. Wittmier, "Prairie Potholes: Can We Save Them From The Plow?," 50 Outdoor America (No. 4), p. 9 (1985) ("Can We Save Potholes?"). Over 93% of the waterfowl produced in North Dakota come from privately owned wetlands. During 1967-69 North Dakota averaged 1.6 million breeding pair of ducks. Waterfowl production in one South Dakota study area averaged 140 ducks per square mile per year. Stewart & Kantrud, "Breeding

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[8] Part of the pothole region is located in Canada where it is under the same pressure from agricultural conversion.

Waterfowl Populations in the Prairie Pothole Region of North Dakota," 76 Condor (No. 1) 70 (1974). When drought strikes Canadian breeding areas, the United States and especially North Dakota areas can be crucial to maintaining the continental waterfowl population.

The seasonal variability of pothole inundation is one of the prime reasons why these wetlands are so important to waterfowl. Smaller, shallower potholes are important to breeding pairs because these wetlands thaw early in the spring and provide abundant invertebrates and aquatic plant food. The large number of these small, isolated wetlands also facilitates waterfowl production by permitting breeding pairs to disperse and claim territory, and by reducing the risk of disease which is increased when waterfowl are concentrated on shrinking habitat. Id. at 43; Can We Save Potholes?, p. 9.

Type 1 wetlands are especially critical because they tend to be smaller than other potholes and studies have shown that the number of individual wetlands is more important duck production than the total number of wetland acreage. Linder & Hubbard, "Wetland Values in the Prairie Pothole Region of North America," in Proceedings of Great Plains Agricultural Council (1982). One study found that less permanent wetlands, including Type 1 wetlands, composed 35 percent of the wetlands in North Dakota but supported over 57 percent of the breeding population. U.S. Fish & Wildlife Service, "Use of Shallow Wetlands by Breeding Waterfowl (unpubl.). During years when there is plenty of water nearly two-thirds of the breeding population uses these impermanent wetlands, including wetlands that have been tilled but not converted in previous years. Id. Although these wetlands may hold water for only a short time each year that period is critical to migrating ducks for resting stops and for courtship and egg-laying. U.S. Fish & Wildlife Service, "Wetland Resource North Dakota" (unpubl.).

Although it may seem more convenient to humans to ask or expect the ducks to use more permanently flooded, larger wetlands for all stages of breeding, the ducks simply have not evolved that way. Whether we like it or not, destruction of these Type 1 wetlands means further losses in already

declining duck populations. That is inconsistent with the statute because wildlife protection was an express purpose of Swampbuster. H.R. Rep. No. 99-271, 99th Cong., 1st Sess. 87 (1985).

These ducks belong to the Nation. Waterfowl banded in North Dakota, for example, have been recovered in 46 states, 10 Canadian provinces and territories and 23 other countries. Wetlands Status and Trends, p. 1. As recognized by Justice Oliver Wendell Holmes over a half-century ago, these are "birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away." Missouri v. Holland, 252 U.S. 416, 434 (1920).

These birds are money in the bank. In 1980 an estimated $638 million was spent by hunters pursuing migratory birds. U.S. Fish & Wildlife Service, 1980 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation, p.70. Moreover, they are highly valued by the 2 million or so duck hunters found in every state of the Union.

But these birds are in trouble. Duck populations have crashed to their lowest levels in recorded history. The reason, according to FWS, is simple: loss of habitat. U.S. Fish & Wildlife Service, A National Waterfowl Management Plan for the United States 5 (1982). The loss of habitat in the United States precipitating this decline is directly attributable to the agricultural conversion of the highly productive prairie pothole wetlands.[9]

Therefore, pothole conversion in the Dakotas is far from a parochial problem. As Justice Holmes observed, no single state can save our duck populations. However, failure to enforce Swampbuster in just two states, North and South Dakota, can have dramatic impacts on continental waterfowl populations. Only Congress can effectively represent the interest of the entire Nation in preventing federal tax dollars from fueling the destruction of prairie potholes. The language employed in Swampbuster and the legislative history defining wetlands could not be any clearer. Type 1

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[9] Protection of waterfowl wintering habitat is also critical.

wetlands can only be read out of the Act by interpretive sleight of hand.

Soil and water conservation.

Wildlife is far from being the only or even the most important reason for protecting prairie potholes. Indeed, prairie potholes play a major role in maintaining the viability of agriculture by preventing flooding and recharging groundwater supplies.

Groundwater Recharge

The prairie potholes of the Dakotas are important in recharging groundwater aquifers in this region. Hubbard & Linder, "Spring Runoff Retention in Prairie Pothole Wetlands," 41 Journ. of Soil and Water Conservation (No. 2) 122 (1986). One study in Northeastern South Dakota has estimated that 213 wetlands produced a total minimum recharge of about 12 acre-feet in a 1602-acre area. This volume could irrigate 160 acres with 1.4 inches of water, or supply water for 1,699 head of cattle for 1 year. Id.

Because prairie wetlands are hydraulically connected with the water table, their drainage should eventually result in declines in water table elevation. Id. The reverse is true if wetlands are saved. Thus prairie potholes are really savings banks for groundwater when drought strikes, as it often has in the Dakotas, with vicious effects on agriculture. Brun, et al., "Stream Flow Changes in the Southern Red River Valley of North Dakota," 38 North Dakota Farm Research Bimonthly Bull. (No. 5) 11 (1981) ("Stream Flow Changes in Red River Valley").

Flood Control

Flooding is a substantial problem in the Dakotas and can often lead to total destruction of crops and bridges, damage to homes and businesses, and erosion of valuable soils. In Enderlin, North Dakota, major sections of the town have been abandoned to repeated flooding, a phenomenon that has developed in only the last 25 years. Stream Flow Changes in Red River Valley, p. 11. While climate plays a major role in

the timing and degree of flooding, potholes reduce flood flows. Drainage of wetlands that would otherwise store excess water is a factor that has aggravated unprecedented flooding in the Southern Red River Valley in North Dakota. Id.; Ludden, et al., "Water Storage Capacity of Natural Wetland Depressions in the Devils Lake Basin of North Dakota," 38 Journ. of Soil and Water Conservation (No. 1) 45 (1983).

Prairie pothole wetlands store spring snow melt and storm runoff and thereby moderate flooding in the Dakotas. The 213 small wetlands in the 1602-acre South Dakota study area discussed above retained a minimum of 158.7 acre-feet of water during the spring thaw. Drainage of these wetlands would contribute to flooding at lower elevations in the watershed under certain conditions. Id. Prairie potholes in the Devils Lake Basin of North Dakota have a maximum storage capacity of 657,000 acre-feet, and retain 72% of the total runoff of a 2 year event. These potholes would retain about 41% of the total runoff of a 100 year event. Ludden, et al., "Water Storage Capacity of Natural Wetland Depressions in the Devils Lake Basin of North Dakota," 38 Journ. of Soil and Water Conservation (No. 1) 45 (1983). Drainage of these wetlands could significantly affect flooding in the Devils Lake Basin.

In South Dakota the flood control value of wetlands was recognized when, on December 8, 1987, Governor George S. Mickelson endorsed a proposal by NWF's Prairie Wetland Resources Center for the restoration of over 26,000 acres of drained wetlands to alleviate flooding from Lake Thompson--flooding which probably resulted from the destruction of these same wetlands. Floodwater runoff raised the lake each year and caused serious local flooding.

ARGUMENTS AGAINST EFFECTIVE APPLICATION OF SWAMPBUSTER ARE NOT PERSUASIVE.

None of the arguments advanced against Swampbuster in North Dakota are convincing. The foremost goal of Swampbuster opponents in that state is the elimination of Type 1 wetlands from the Act. It is said that the statute

should not cover small "wet spots" that are "nuisances." Moreover, farmers in North Dakota argue that it is "unacceptable" to eliminate eligibility for agricultural benefits if farmers drain those areas.

First, federal taxpayers all over the country are footing the bill for wetlands conversion in North Dakota and these taxpayers should decide what is an "acceptable" expenditure of their money, not the recipients of this money located in one state. These taxpayers have spoken through their legislators to say that the farm subsidy program should not be encouraging farmers to bring new land into production at the expense of wetlands.

Second, if these "wet spots" really are just nuisances, then the farmer can freely drain them without loss of benefits by not planting an agricultural commodity on them after they are converted. If the farmer's true intent is just to eliminate "nuisance wet spots," then he can do so without fear of loss of benefits. However, if these "nuisances" are drained and then farmed, the intent of drainage is to increase farmland and that is what Swampbuster was designed to discourage.

Third, if these wetlands are flooded only temporarily each year, the farmer can farm them without loss of benefits as long as he does not destroy their wetland characteristics. Even tilled Type 1 wetlands provide waterfowl values so long as they are not drained. In such areas Swampbuster allows the farmer to farm and the wetlands to stay wetlands so farmers and wildlife can benefit. When these areas are drained, only the individual farmer benefits at the expense of flood control, groundwater recharge, and wildlife.

Fourth, if the areas are too wet to crop at any time without drainage then one has to wonder how it can be claimed that these areas are not wetlands.

The only thing Swampbuster prevents is the creation of more farmland at the expense of wetlands, which we are fast losing.

Farmers have argued that the penalties are too severe and that "inadvertent" wetlands destruction should not be

punished by loss of benefits. However, there is no objectively valid way of determining what is inadvertent drainage and what is not. Such a determination would burden Swampbuster administration and risk making the present administrative chaos even worse. Also, such an approach would seriously undermine the deterrent effect of loss of benefits. This would encourage farmers to drain wetlands without risk because if they are caught they could claim the wetland drainage was inadvertent.[10] This would destroy any hope that Swampbuster could succeed through voluntary compliance.

SWAMPBUSTER AND THE AMERICAN FARM

The National Wildlife Federation recognizes that the family farm is a critical resource of national importance. For example, NWF has long been an advocate of effective soil conservation to maintain our farm resources. There is no evidence to demonstrate that effective enforcement of Swampbuster poses a threat to the American family farm.

Effective enforcement of Swampbuster actually creates a net benefit for farming. Drainage of wetlands may seem like a short term gain for an individual farmer, but this ignores the fact that such drainage merely externalizes the loss of wetlands values, such as flood control, to the entire agricultural community. In times of economic hardship this sort of individual, short term decision-making may be exacerbated by financial pressure to maximize individual yield. Our painful awareness of the long-term overall economic costs of this individual decision-making led to the creation of much of the existing farm subsidy program. Farmers must be stimulated to make decisions (for example to reduce production) that might reduce individual profits but in the aggregate are necessary to preserve the farm economy (by keeping a floor under commodity prices). Similarly, farmers must be discouraged from draining wetlands, a

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[10] Continued mapping such as in the Red River Valley of North Dakota and individual wetlands determinations such as those performed in Minnesota should effectively remove the likelihood of truly "inadvertent" wetlands destruction.

decision that may yield an individual, short-term profit, but that may collectively spell disaster for the entire farming community.

Swampbuster and Private Property

Finally, we wish to emphasize what Swampbuster does not do. It does not prevent farmers from destroying wetlands on their property to increase the amount of land in production. Moreover Swampbuster results in ineligibility for benefits only if a farmer drains a wetland and produces an "agricultural commodity" in the converted wetland. 16 USC 3821.[11] Thus a farmer may safely drain a wetland for any purpose other than production of agricultural commodities without loss of benefits.

Swampbuster is not a statute where the federal government is telling landowners what they can and cannot do with their private property. Instead, Congress has said to farmers, "You can drain your wetlands if you want, but don't expect the federal taxpayer to pay for it." Of course, we realize that, in many cases, removal of all agricultural subsidies will be a powerful disincentive. But, this disincentive is clearly necessary to allow Congress to ensure that the expenditure of federal tax dollars is consistent with federal policies.

As a result, the farm economy crisis and the sanctity of private property are superficially appealing, but ultimately false issues in the context of Swampbuster.

Allowing Swampbuster's provisions to continue to be ignored represents a shortsighted disregard for the realities of Nature--a Nature that can bring drought and devastating floods as well as abundant, diverse wildlife. Congress must recognize that wetlands can play a major role in banking the dividends of good years and tempering the adversity of bad years brought by the unpredictable forces of Nature.

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[11] The Act defines "agricultural commodity" as "any agricultural commodity planted and produced in a State by annual tilling of the soil, including tilling by one-trip planters ...." 16 USC 3801(a)(1)(A).

Effective application of Swampbuster does not mean economic disaster for the American family farm. We reject the notion that a viable farm economy is incompatible with preserving wildlife habitat. Over the years we have worked closely with farmers and farm organizations to show that farms can be economically productive without removing valuable wildlife habitat. Wildlife and farms can and do coexist.

LETTER FROM WAYNE BARON

Bob Christman
State Executive Director
ASCS
Box 3046, Federal Building
Fargo, ND 58108-3046

October 21, 1987

Dear Bob:

I have received the copy of the ND State ASCS Committee minutes in relation to the Barnes County Swampbuster cases. To say the least, we are disappointed to see that the State Committee has not come to grips with the problem in Barnes County. The action of the Committee to meet again with landowners does not rectify the fact that the County Committee, in our opinion, made a decision contrary to Swampbuster interim rules. Any new information should be subject to a redetermination.

Our rationale for this position is sound.

THE PETERSON DETERMINATION

On January 22, 1987, Mr. Peterson signed a USDA Certification (Form AD-1026) that stated, during the 1987 crop year, no crop would be produced on a wet area on his farm converted after December 23, 1985. He also certified he would not convert any wet area for production of a crop during the 1987 crop year.

On April 8, 1987, you informed Mr. Peterson new drainage of wet areas had been observed on his land, and he might be in violation of Swampbuster provisions. You informed Mr. Peterson his drainage activity was exempt from Swampbuster on April 17, 1987, although the basis for that exemption had not yet been decided.

After that letter, the COC apparently determined Mr. Peterson's drainage was exempt from Swampbuster because he "made application to drain land prior to 12-23-85." Not until June 10, 1987, did the COC formally document its decision to exempt the drainage.

Our records show that Mr. Peterson submitted an application to drain wet areas in the E 1/2, Section 30, Township 139, Range 58 on or about March 18, 1986, and did not receive BCWRD approval of the drain until June 30, 1986. Although Mr. Peterson submitted an earlier application to drain on November 22, 1985, that application apparently was not approved.

This documentation clearly does not support a legal "commenced" determination. The COC expressly based their decision on the ASCS Handbook, 6-CP-91. That provision, as of Amendment 5, dated 11-20-86, exempts drainage as having begun before December 23, 1985, only when one of the following three conditions apply:

1. Earth moving began before December 23, 1985.

2. The person seeking benefits entered into a contract for earth moving to convert a wetland prior to December 23, 1985.

3. The person seeking benefits is in the jurisdiction of a water resource district board and is or will be assessed for the activities of the drainage project (and certain other conditions apply).

There is no evidence that any of these conditions apply to Mr. Peterson's drainage. Mr. Peterson himself has confirmed to the National Wildlife Federation (NWF) that the COC determination was based on his earlier unsuccessful application to drain dated November 22, 1985. While the NWF understands that the COC's have been faced with considerable confusion and uncertainty in how to implement Swampbuster, the determination described above is a flagrant violation of ASCS's own operating manual.

THE HENDERSON DETERMINATION

Paul Henderson signed a Form AD-1026 Certification on January 9, 1987. Like Mr. Peterson, he denied any production of crops on converted wetland or plans to convert any wetland for crop production.

Just as in the Peterson case, Barnes County ASCS informed Mr. Henderson on April 8, 1987, of possible Swampbuster violations. Barnes County ASCS also informed Mr. Henderson of his exemption on April 17, 1987. Again, no decision had been made as to the specific exemption which applied. Just as in the Peterson case, the County ASCS decided after the letter, on April 21, 1987, that Mr. Henderson's drainage was exempt as having been planned prior to December 23, 1985. Once again, this determination was not formally approved by the COC until June 10, 1987.

Our records show Mr. Henderson probably may have had his land surveyed as part of a plan to drain in September, 1985. Mr. Henderson submitted an application to drain in October, 1985. However, that application to drain was denied in April, 1986, and was not even resubmitted until March, 1987. As of late June, the application to drain still had not been approved.

The same standard for a "commenced" determination which is outlined above applies to this case. Again, the standard clearly has not been met. There is no evidence of earth moving, a contract for earth moving, or an assessed district drainage project which the ASCS can point to to justify its determination.

It is our opinion both the Henderson and Peterson drains should be remanded back to the County Committee for reconsideration. If indeed the individuals have new information, it should be submitted at that time.

The NWF is, of course, particularly concerned with the wetland conservation goals of the Swampbuster law. An ASCS internal requirement that landowners immediately restore all wetlands on their land which were converted and cropped might be an acceptable settlement in the Barnes County cases. However, such an alternative solution is proposed only as a possible settlement and in no sense represents NWF's position on the relief actually required by statute.

Sincerely,

Wayne R. Baron
Director

MINUTES OF STATE ASCS COMMITTEE MEETING

COMPLIANCE

Sept 23, 1987

The STC reviewed the failure to fully comply case from Dunn County for Matt Tachencko's Farm No. 72 and concurred with the standard payment reduction of $1.805.

SWAMPBUSTER:

The STC met with Vernon Sandness, District Director, the SED and the program specialist to discuss the determinations by the Barnes County ASC Committee that the Henderson Land and the land owned by Monte Peterson were not in violation of swampbuster and were eligible for program payments. Wildlife officials have since questioned this determination by the Barnes COC.

Vernon Sandness advised that the Barnes County Committee based their determination primarily on the fact that in both instances the producers had an Application to Drain dated prior to December 23, 1985, on file with the State Water Commission. This permit indicated to them that the producer had intent to drain prior to December 23, 1985. In the Henderson Land case, a statement from Blumer Construction attested to the fact that surveying had been performed for the intended drainage prior to December 23, 1985.

The program specialist advised the STC that the interim rules required a contract to move dirt or dirt moved before December 23, 1985, before a determination of "commenced" could be made. Surveying was not included in the criteria of substantial commitment of funds for a commenced determination.

The DD and COC feel that FWS are zeroing in on Mr. Henderson because of a personal feud between Mr. Henderson and FWS.

SCS had not provided the county committee with a determination that the area in question was a converted wetland until August, 1987, and then only after being repeatedly pressed to give a determination. Their original oral determination had been that the work was merely a cleanout. Cooperation by SCS in Barnes County has been less than desirable.

The Program Specialist also explained the new criteria concerning "abandonment" of converted wetlands and the impact of that new criteria.

The STC expressed reservations about requesting a redetermination by the Barnes COC. The STC determined that the Barnes County Committee be requested to meet with the producers, with SCS, and with the DD present. The producers should be requested to provide any additional evidence they may have to support their case.

Copies of a letter from the Ramsey County Committee in which they expressed their concerns about Type I and II wetlands was discussed with the STC.

The Program Specialist also provided the STC with a summary of the items reviewed at the recent national meeting he attended concerning the final Sod/Swampbuster rules.

12-10-87

COMPLIANCE

The STC reviewed the swampbuster commenced determination involving [redacted] Barnes County. After extensive discussion and review of all information in this matter, the STC concurred with the Barnes County Committee determination that the drainage had commenced prior to December 23, 1985.

Items considered by the State Committee were the fact that Paul Henderson had paid $1,294.30 for surveying on September 30, 1985. On April 17, the CED had sent a letter to Mr. Henderson advising him

that based on a (verbal) notification from SCS personnel that the activity was merely a cleanout or that work had started prior to December 23, 1985, there was no violation of the swampbuster provisions. The 1987 crop was not planted by Mr. Henderson until after receipt of the determination by the Barnes COC that swampbuster provisions had not been violated. The official notification by SCS that the area in question was a converted wetland was not made until August 11, 1987.

The STC determined that the interpretation and application of the Interum Rules Governing Swampbuster may have been misconstrued. However based on the information available to the COC at the time of the determination, the STC determined the COC acted correctly.

The STC reviewed the swampbuster commenced determination involving Monte Peterson, Barnes County. After extensive discussion and review of all information in this matter, the STC concurred with the Barnes COC determination that the drainage had commenced prior to December 23, 1985.

Items considered by the State Committee were the fact that Monte Peterson had a statement from Bob's Excavating dated December 12, 1983, for dirtwork and culvert. On April 17, a letter from the CED was sent to Peterson advising him that based on a (verbal) notification from SCS personnel that the activity was merely a cleanout or that work had started prior to December 23, 1985, there was no violation of the swampbuster provisions. The 1987 crop was not planted by Mr. Petersonuntil after receipt of the determination by the Barnes COC that swampbuster provisions had not been violated. The official notification by SCS that the area in question was a converted wetland was not made until August 11, 1987.

The STC determined that the interpretation and application of the Interim Rules Governing Swampbuster may have been misconstrued. However based on the information available to the COC at the time of the determination, the STC determined the COC acted correctly.

STATEMENT OF WILLIAM BRYSON, MINNESOTA

Senator BURDICK. Our next witness is Mr. William Bryson, Minnesota.

Mr. BRYSON. Thank you, Mr. Chairman, Senator Burdick, committee staff. I am William H. Bryson. I have been a Soil and Water Conservation District Supervisor since 1968; was appointed by the Governor to the Minnesota Soil Conservation Board in 1981 and 1982; and I was president of the Minnesota Association of Soil and Water Conservation Districts in 1983 and 1984. I also served on the National Council of the National Association of Conservation Districts in 1984 and 1985.

I served on the Rules Advisory Committee for the Minnesota State Planning Agency for promulgating rules for local water management in the state of Minnesota, and just last week was appointed to the Advisory Committee on Ground Water Problems Within Our State.

I own and operate a 370-acre crop and livestock farm near Alden, MN. My primary crops are corn, soybeans, alfalfa, and oats. I had a 35-cow Grade A dairy operation from 1945 to 1978 and have had a 30-cow cow-calf beef operation from 1970 to the present. Since 1966, I have voluntarily set aside an 18-acre wood lot and an 18-acre wetland complex for wildlife. I do not even graze this reserve. I have received no compensation for it. Yet I have conducted a profitable farm operation every year except one since 1945.

I am here today to support retaining the Swampbuster provisions of the 1985 farm bill, also known as the Food Security Act of 1985.

In April 1984, I was one of about 45 people who met with former Secretary of Agriculture, John Block, and the then Chief of the Soil Conservation Service, Peter C. Myers at Mr. Myers' farm in Missouri for a conservation roundtable to discuss the features that we felt should be a part of the new farm bill.

What finally evolved as the Food Security Act of 1985 included most of the recommendations that came from the roundtable, including a continued price support structure and the conservation and production stabilization features of cropland set-aside, the Conservation Reserve Program, conservation compliance, and the Sodbuster/Swampbuster Program.

These last two conservation provisions were intended to keep fragile and sensitive lands not in production from being converted to further production of crops that were already in surplus supply. They were, in short, restrictions placed on farmers in return for economic program benefits.

What has been the result of this legislation? Farm income has risen considerably. But about one-half of this gross income is in the form of farm program payments, price deficiency payments, paid set-aside acre payments and the Conservation Reserve Program.

Our county extension director told farmers at a meeting just last week, "You have to participate in the feed program; it's the only game in town." He also said that our nation now has the capacity to produce 27 percent more grain than we can use and/or export. "We must," he said, "reduce production. And," he added, "We must observe Swampbuster and Sodbuster rules to maintain our eligibility for the program."

Drainage activity in Minnesota slowed almost to a standstill in the early 1980's. The farm economy and grain prices were so bad that drainage was just economically not feasible. The 1985 farm bill changed that.

Swampbuster provisions to the law were intended to not only protect wetlands, as a valuable natural resource in their own right, from drainage, but also to keep American agriculture from increasing the capacity to produce commodity already in surplus supply.

The Swampbuster provisions of the act helped make an expensive farm bill more acceptable to Congress as a whole by providing benefits for society as a whole. Farmers were simply asked to give up the right to destroy valuable wetlands in exchange for the economic security and stability the act provides, is providing.

Has it worked? At this point, my statements may be in conflict with some given earlier today. John Edwards, Minnesota's assistant state Swampbuster SCS soil conservationist, told southeast Minnesota SCS and ASCS employees at a training session in Rochester 2 weeks ago that 30,000 acres of wetlands have been drained in Minnesota since December 23, 1985.

Landowners have only certified 15,000 of these acres. Landowners converted the remaining acres without contacting their local Soil Conservation Service or ASCS office. Edwards said the problem is many landowners are convinced they can ignore the Swampbuster provisions because they won't ever be caught. "Our number one problem," he said, "is convincing landowners that ASCS and the Soil Conservation Service do have a viable system that cannot be ignored."

ASCS annually photographs all cropland with 35 millimeter slides. Converted lands can be identified quickly by reviewing slides over the past few years. Fifteen percent of the cropland in each community is spot checked each year, and slides are kept on file at the offices for at least 7 years.

Under present rules, Swampbuster violators should be denied program benefits. Don Edwards continued, "Yes, they will be identified. It may take 2 or 3 years to do it."

Stan Schrock, a compliance officer with the Iowa ASCS, said that Iowa farmers are not ignoring the Swampbuster provisions but that there may be some farmers who are convinced that the conservation provisions of the 1985 farm bill will never be fully implemented.

Ron Nargang, director of Minnesota's Department of Natural Resources Division of Water and the former director of the Minnesota Soil and Water Conservation Board—he was executive director of our Soil and Water Board while I was on that state board—says Minnesota had more wetland drainage last year than in the 10 previous years.

Mr. Nargang feels, "The rules are fine; the training given SCS and ASCS personnel is fine; but we are staring at a massive policy conflict in this farm bill." Referring to the training and so on, "Yes, ASCS and Soil Conservation Service have been having training sessions."

It is our feeling in Minnesota that the personnel in the field are well versed in the requirements of the law and our intent on implementing them.

Back to Ron Nargang's massive policy conflict. He says, and this was in a telephone conversation, "Local ASCS committees are granting exemptions to Swampbuster 'at the drop of a hat'."

He adds, "The thrust of the program was to take land out of production and improve the farm economy. The most immediate result of the improved farm economy has been the increased drainage of wetlands for conversion to crop production."

I have talked to many others about the Swampbuster program these last 2 weeks. Mr. Myron Stanke, a farmer and soil and water district supervisor from Steele County, MN, who is the chairman of the 11-county Hiawatha Valley Resource Conservation and Development project in southeast Minnesota, indicates changes in Swampbuster would be "insane at this time."

A U.S. Fish and Wildlife Service biologist and a Minnesota Division of Wildlife Manager felt that commenced project exemptions had passed their peak and that no changes should be made in the Swampbuster rules.

The manager of our Freeborn County ASCS Office simply said the rules were being followed. The Minnesota Commissioners of Agriculture and Natural Resources, by joint letter to ASCS, USDA, in October 1986, when the current permanent rules were being established, voiced, "strong support" for the Sodbuster/Swampbuster provisions as those rules would have "a major positive role im preserving our state's and the nation's soil, water, and wetland resources."

Major emphasis has been given to the wildlife enhancement attributes of wetlands. I wholeheartedly agree. But learning more about the other values wetlands provide to society as a whole, such as improving our water quality, modifying flood flows, and recharging underground aquifers, may make the wildlife benefits seem incidental. The more we learn about wetlands, the more valuable they become.

The 1985 Food and Security Act, what we call the farm bill, it is working. SCS and ASCS personnel are well-trained; they are administering the program. The act has improved the farm economy and provided some stability for agriculture as an industry and the nation as a whole.

I urge this committee to leave the 1985 farm bill, including Swampbuster, as it is.

Thank you for your consideration of my thoughts on this matter. If you have my questions, I will attempt to answer them.

Senator BURDICK. Thank you very much.

[The statement follows:]

STATEMENT OF WILLIAM H. BRYSON

I am William H. Bryson. I have been a soil and water conservation district supervisor since 1968, was appointed by the Governor to the Minnesota Soil Conservation Board in 1981 and 1982, and was President of the Minnesota Soil and Water Conservation Districts in 1983 and 1984. I also served on the national council of the National Association of Conservation Districts (NACD) in 1984 and 1985.

I own and operate a 370 acre crop and livestock farm near Alden Minnesota. I had a 35-cow Grade A diary operation from 1945 to 1978 and have had a 30 cow cow-calf beef operation from 1970 to the present. Since 1966 I have voluntarily set aside an 18 acre woodlot and an 18 acre wetland complex for wildlife. I do not even graze this reserve. I receive no compensation for it. I have conducted a profitable farm operation every year except one since 1945!

I am here today to support retaining the Swampbuster provisions of the 1985 Farm Bill, also known as the Food Security Act of 1985.

In April of 1984, I was one of about 45 people who met with former Secretary of Agriculture John Block, and the then Chief of the Soil Conservation Service, Peter Myers at Mr. Myers' farm in Missouri for a "Conservation Roundtable" to discuss the features that we felt should be a part of the new farm bill. What finally evolved as the Food Security Act of 1985 included most of the recommendations that came from the "Roundtable," including a continued price support structure and including the conservation and production stabilization features of cropland set-aside, the Conservation Reserve Program, conservation compliance, and the Sodbuster/Swampbuster program. These last two conservation provisions were intended to keep fragile and sensitive lands not in production from being converted to further production of crops that were already in surplus supply. They were, in short, restrictions placed on farmers in return for economic program benefits.

What has been the result of this legislation? Farm income has risen considerably. But about one-half of this gross income is in the form of farm program payments -- price deficiency payments, paid set-aside acres, and the Conservation Reserve Program. Our county Extension Director told farmers at a meeting last week, "You have to participate in the feed grain program. It's the only game in town." He also said that our nation has the capacity now to produce 27% more grain than we can use and export. We must, he said, reduce production. And, he added, we must observe Swampbuster and Sodbuster rules to maintain our eligibility for the program.

Drainage activity in Minnesota slowed almost to a standstill in the early 1980s. The farm economy and grain prices were so bad that drainage was not economically feasible. The 1985 Farm Bill changed that.

Swampbuster provisions of the law were intended to not only protect wetlands, as a valuable natural resource in their own right, from drainage, but also to keep American agriculture from increasing the capacity to produce commodities already in surplus supply. The Swampbuster provisions of the Act helped make an expensive farm bill more acceptable to Congress as a whole. Farmers were simply asked to give up the right to destroy valuable wetlands in exchange for the economic security and stability the Act provides.

Has it worked? John Edwards, Minnesota's Assistant State SCS Soil Conservationist, told southeast Minnesota SCS and ASCS employees at a training session in Rochester two weeks ago, that 30,000 acres of wetlands have been drained in Minnesota since December 23, 1985. Landowners have only certified 15,000 of these acres. Landowners converted the remaining acres without contacting their local SCS office. Edwards said the problem is many landowners are convinced they can ignore the Swampbuster provisions because they won't ever be caught. Our number one problem, he said, is convincing landowners that we have a viable system that cannot be ignored.

ASCS annually photographs all cropland with 35mm slides. Converted lands could be identified quickly by reviewing slides over the past few years. Fifteen percent of the cropland in each county is checked each year and slides are kept on file for at least seven years. Under present rules, Swampbuster violators should be denied program benefits.

Stan Schrock, a compliance officer with the Iowa ASCS, said that Iowa farmers are not ignoring the Swampbuster provisions, but that there may be some farmers who are convinced that the conservation provisions of the 1985 farm bill will never be fully implemented.

Ron Nargang, Director of Minnesota Department of Natural Resources' Division of Waters and the former Director of the Minnesota Soil and Water Conservation Board, says Minnesota had more wetland drainage last year than in the ten previous years! Mr. Nargang feels "The rules are fine, the training given SCS and ASCS personnel is fine, but we are staring at a massive policy conflict. Local ASCS committees are granting exemptions to Swampbuster 'at the drop of a hat.' " He adds -- "The thrust of the program was to take land out of production and improve the farm economy. The most immediate result of the improved farm economy has been the increased drainage of wetlands for conversion to farming."

I have talked to many others about the Swampbuster program the last two weeks. Mr. Myron Stanke, a farmer and Soil and Water District Supervisor from Steele County, who is the chairman of the 11 county Hiawatha Valley Resource Conservation and Development project in Southeast Minnesota, said changes in Swampbuster would be "insane at this time." A U.S. Fish and Wildlife Service biologist and a Minnesota Division of Wildlife Manager felt the "commenced project" exemptions had passed their peak and that NO CHANGES should be made in Swampbuster rules. The manager of the Freeborn County ASCS office simply said the rules were being followed. The Minnesota Commissioners of Agriculture and Natural Resources, by joint letter to ASCS, USDA, in October of 1986, voiced "strong support" for the Sodbuster/Swampbuster program as one that would have "a major positive role in preserving our State's (and the Nation's) soil, water, and wetland resources."

Major emphasis has been given to the wildlife enhancement attributes of wetlands. I agree. But learning more about the other values wetlands provide to society as a whole, such as improving water quality, modifying flood flows, and recharging underground aquifers, may make the wildlife benefits seem incidental. The more we learn about wetlands, the more valuable they become.

The 1985 Food and Security Act (the Farm Bill) is working. SCS and ASCS personnel are well trained in administering the program. The Act has improved the farm economy and provided some stability for agriculture as an industry and the nation as a whole. I urge this committee to leave the 1985 Farm Bill, including Swampbuster, as it is!

Thank you for your consideration of my thoughts on this matter. If you have any questions for me, I will attempt to answer them.

EFFECTIVE DATE OF SWAMPBUSTER

Senator BURDICK. The regulations under the Swampbuster act did not become final until the 17th of September. That is when the act became effective. The Department says that they are now mapping the countryside to find out where the act should apply. They also testified that should be about March 15 when that would be done.

Do you think from September 17 to March 15 is an adequate time for a farmer to have his matter fully considered by the Swampbuster ASCS committee or anybody else? Is that sufficient time?

Mr. BRYSON. May I respond? Our ASCS in Freeborn County—that is

the one I deal with—issues a monthly newsletter to all farmers in the county. The provisions of the farm bill, including Swampbuster/Sodbuster are brought to the attention of the farmers. They are told that if they have any question about their programs, what they are doing on the farm is or if it will affect their program benefits, that they should come to the office and check.

The problem is for the farmers, if they have questions or are uncertain, they should get to the office and find out what their status is.

Senator BURDICK. Do you think that the staffs of the various ASCS committees and Soil Conservation committees are adequately staffed in this short period of time to give all the answers?

Mr. WARRICK. Senator, let me just briefly respond to that. The bill was passed in December 1985. They have operated under the interim rule in the Swampbuster. There has been, basically, very little change. If not, it has been firmed up.

In fact, as from previous testimony, they said it actually has been firmed up. So most farmers have realized that Swampbuster was there. It is coming up 3 years now. I think this has certainly given most farmers, I would think—I would have had those lands that would be affected, certainly—knowledge that this was going to be a reality. You are talking about, obviously, a very short timeframe, now, that the final rule, but they did operate under that interim rule for a long time. So I don't think that is actually correct.

Senator BURDICK. It is not correct that September 17 was the final rule?

Mr. WARRICK. The final rule, but I said they operated under the interim rule up to that time.

Senator BURDICK. We are talking about the final rule.

Mr. WARRICK. Most farmers knew that the Swampbuster was passed in 1985.

Senator BURDICK. They didn't know what the final rules were until September 17.

Mr. WARRICK. I would hope they would have realized they weren't going to weaken. I knew as a farmer that they weren't going to weaken. I think that SCS does have good personnel out there that can do it. I don't know if they can get it done by March 15 in North Dakota. I am not familiar, but I think that this is an argument to certainly help the funding process in ASCS to see that they do have adequate people. I would hope that you could consider that.

Senator BURDICK. In other words, it is your contention that this is sufficient time for all the farmers to be able to accurately judge their situation, what they should do about their farming operations? That is ample time, to the 15th of March?

Mr. WARRICK. It certainly has been in Nebraska.

Senator BURDICK. And you believe that the USDA has sufficiently trained staff to do the job within that period, too?

Mr. WARRICK. They are training staff. I think that this is not an argument, I would hope, that we weaken the final date, but I think that in

Nebraska that we do have trained staff. I have just, the other week, visited with state SCS people at the state level, and they feel very confident that they are implementing a lot through its intended purpose and that they do have the trained staff; they are viable.

Mr. BARON. Senator? I might add that I don't know of the competency of the staff. I do know those individuals who are training the staff, and all those individuals are very confident, so I would assume that if the training is done correctly, we will have competent individuals out there making those determinations.

Senator BURDICK. I am not impugning the ability of the staff of any of these organizations, county committees, or anything else. But here they are, given a new piece of legislation, very complicated, very involved, and now you are going to have the farmer descend upon these offices in the next 2 or 3 months and they are supposed to have all the answers. I just wonder about that, that is all.

Mr. BRYSON. Mr. Senator, our state conservationist, Mr. Gary Nordstrom, has directed SCS field personnel to give first priority to the Food Security Act of 1985. In other words, regular contribution activities of our district are put on the back burner, so to speak. Priority is given to implementing and determinations regarding the 1985 farm bill.

Senator BURDICK. Staff tells me that the 1985 farm act requires a conservation plan to be adopted by about this time, too. That is going to require a lot of clerical work.

Mr. WARRICK. Senator, I have been farming since I got out of the Army in the early sixties. We have had a conservation plan made out back in the forties, and it has been updated continually.

I consider the future farmer of America, if I may coin a phrase that is well used, is one that not only is a good manager, but he is a good resource manager.

I know my soils well on that farm. I know my wetlands, and I know that they are, they have been identified to me personally since I started farming. It is inconceivable to me that a farmer suddenly has been farming out there for a long time, has suddenly discovered that he has a wetland that has never been discovered before. It is just hard for me to accept that.

This is part of doing business as a farmer, to know your land, your soils and its capabilities. It is just basic good management.

Now suddenly they say, "This is a whole new game and we don't know, that suddenly, this has been defined anew." I find that very difficult to conceive as a manager of a farm for the past 25 years.

Senator BURDICK. Do you consider one-fourth of an acre of land, sometimes with water on it, do you consider that a wetland swamp?

Mr. WARRICK. Would you repeat the question?

Senator BURDICK. I say, would you consider one-fourth of an acre of land that is sometimes underwater, would you consider that swampland?

Mr. WARRICK. If it has been defined to me by technical help that I use all the time as having hydroponic soils, you bet I would; no problem with that at all.

Senator BURDICK. Is there any language by which you would exempt land, any size?

Mr. WARRICK. Under the rules, no, I don't think there should be, because I think once you make an exception you are not making the intent of what the Swampbuster reads. I have difficulty exempting.

Senator BURDICK. Any size?

Mr. WARRICK. Especially when they can farm it most of the time. I am sorry.

Senator BURDICK. In other words, no limitations, in your opinion? Swampland that is 10 square feet is swampland?

Mr. BARON. I think the law provides for that, though, under the minimal effects situation, Senator.

Senator BURDICK. Many have suggested that a no-net-loss law, like we have in North Dakota, could be effectively substituted for Swampbuster. What are your views on this suggestion? Do you know what our no-net-loss law is?

Mr. BARON. I am very familiar with the no-net-loss bill.

Senator BURDICK. Could that be substituted?

Mr. BARON. I think that, again, going back to the act, the minimal effect clause as in the act would have to be looked at. From my understanding, they are looking at those right now. The only problem there is that on a no-net-loss situation, you are replacing acre-for-acre of wetland, and it really isn't necessarily, an acre that is being put into crop production versus an acre that we might be replacing in a pasture.

So the inequities there are high, and you can see how that would work.

Senator BURDICK. My last question is directed to all three of you. Do you think placing some of this land in the Water Bank is a good alternative?

Mr. BARON. We support all types of acquisition and/or enhancement in programs for wetlands, whether it be specifically the Water Bank or any other program. We would have to look at it.

Mr. WARRICK. Personally, I certainly have no objection to that, if it can be worked out, that is, especially if you could take some of the land that is surrounding the periphery of it and maybe include that also so you would really have a wildlife habitat. There are no problems with spending more money. We have certainly spent it for worse things; I know that.

Senator BURDICK. It could only be less of a burden to a lot of farmers.

Mr. BRYSON. My response to that would be I came up here and lobbied. I was in Washington when I was president of the state association for 4 years asking for more money for the wildlife program.

However, I don't think that it is reasonable to expect full rental payments for lands that were probably purchased for just a few dollars an

acre in the first place. In other words, I don't think it is the intent of the Water Bank Program to pay top rent for land that was acquired as part of the farm at little or no expense. It would make it a real profitable venture to try to go out and buy marshland, to buy it for a few bucks an acre and rent it to the government for $85 or whatever the payment would be.

I think we should be reasonable about this. Government just cannot afford, I don't think, to protect everything that it should be protecting. Somewhere along the line, there should be a sense of stewardship, also; protect something for the value that it has without being compensated for it.

Senator BURDICK. Then you are asking the farmer to take land out of production. Can he afford it?

Mr. BRYSON. Not take land out of production, sir. We are talking about land that has never been in production. That is my concept of the farm bill. The thrust of it was to reduce; the thrust of this 1985 farm bill was to reduce farm production and to protect the resources that deserve protection.

CONCLUSION OF HEARING

Senator BURDICK. Thank you very much.

That concludes the hearing. We will be recessed until the call of the Chair.

[Whereupon, at 1:43 p.m., Tuesday, January 26, the hearing was concluded and the subcommittee was recessed, to reconvene at the call of the Chair.]

[CLERK'S NOTE.—Following are statements that were presented for the record:]

STATEMENT OF HON. JAMES R. SASSER, U.S. SENATOR FROM TENNESSEE

MR. CHAIRMAN, THANK YOU, AND I WOULD LIKE TO ADD A WELCOME TO MY COLLEAGUES AS WE BEGIN OUR WORK FOR THE SECOND SESSION OF THE 100TH CONGRESS.

I WOULD LIKE TO TAKE A MOMENT TO RECOGNIZE AN IMPORTANT DECISION RECENTLY MADE BY THE DEPARTMENT OF AGRICULTURE REGARDING THE CONSERVATION RESERVE PROGRAM. THE DEPARTMENT HAS APPROVED NEW CRP INITATIVES TO ENCOURAGE THE PLANTING OF TREES ON POTENTIAL CRP LAND. THIS ACTION IS VERY IMPORTANT IN THAT IT ADDRESSES WHAT I CONSIDER TO BE ONE OF OUR MOST PRESSING ISSUES, PROTECTING OUR WATER QUALITY.

THE USDA DECISON ALLOWS FOR GREATER TREE PLANTING ON LANDS NEAR STREAMS AND LAKES WHICH COULD NORMALLY BE DEVELOPED FOR AGRICULTURAL USE. THE RULING LOWERS THE QUALIFICATIONS FOR LAND TO BE ENTERED INTO CRP ACREAGE, THEREBY ALLOWING THOSE LANDS BORDERING WATERWAYS TO REMAIN UNDEVELOPED UNDER CRP GUIDELINES. THIS SHOULD BE A MAJOR FACTOR IN REDUCING MUCH OF THE RUNOFF FROM AGRICULTURAL LAND WHICH SO SEVERELY AFFECTS OUR WATER QUALITY.

A RECENT EPA REPORT NOTED THAT AGRICULTURAL RUNOFF WAS ONE OF THE LEADING CAUSES OF NONPOINT SOURCE POLLUTION IN THE UNITED STATES. THE REPORT SHOWED THAT 33 STATES FOUND NONPOINT SOURCE POLLUTION TO BE A MAJOR PROBLEM, AND OVER 45 STATES LISTED AGRICULTURAL RUNOFF AS A MAJOR IMPAIRMENT OF WATER QUALITY. WE NEED TO TAKE A STRONG ROLE IN REDUCING THIS CAUSE OF POLLUTION, AND EFFORTS TO IMPROVE THE CRP ARE CERTAINLY A STEP IN THE RIGHT DIRECTION.

THIS SAME EPA REPORT ALSO CONTAINED INFORMATION REGARDING THE TOPIC WHICH WE ARE HERE TO DISCUSS TODAY, WETLAND PRESERVATION. THE EPA NOTES THAT THERE HAS BEEN A DRAMATIC LOSS IN WETLANDS OVER THE LAST 200 YEARS, APPROXIMATELY 50 PERCENT IN THE LOWER 48 STATES. AS WELL, CURRENT LOSSES CONTINUE AT SOME 350,000 ACRES PER YEAR ACROSS THE UNITED STATES.

THIS IS A SERIOUS LOSS FOR LAND WHICH THE FISH AND WILDLIFE SERVICE HAS IDENTIFIED AS BEING OF THE UTMOST IMPORTANCE FOR THE CONTINUATION OF LITERALLY THOUSANDS OF SPECIES, AS WELL AS THREATENED AND ENDANGERED SPECIES. WETLANDS ARE THE MAJOR HABITAT FOR A VARIETY OF ANIMALS, BIRDS AND FISH, INCLUDING APPROXIMATELY TWO-THIRDS OF THE MAJOR U.S. COMMERCIAL FISH. AS WELL, WETLANDS ACT AS NATURAL FLOOD PREVENTION RESERVOIRS, PROVIDE RECREATIONAL OPPORTUNITIES, AND APPEAR TO BE A SOURCE OF RECHARGING OUR GROUNDWATER SUPPLIES. WE CANNOT SIT BY WHILE THESE WETLANDS CONTINUE TO DISAPPEAR AT SUCH AN ALARMING RATE.

THE WETLANDS PRESERVATION PROVISION, KNOWN AS SWAMPBUSTER, PROVIDES US WITH THE OPPORTUNITY TO TAKE STRONG ACTION TO PREVENT FURTHER DESTRUCTION OF THESE LANDS. APPROXIMATELY 95 PERCENT OF WETLANDS DEVELOPMENT IS ATTRIBUTED TO LAND CONVERTED FOR AGRICULTURAL USE. WHILE CERTAIN LANDS CAN BE DEVELOPED WITHOUT DAMAGING THE FRAGILE ECOSYSTEM WHICH WETLANDS REPRESENT, WE NEED A DEFINITIVE LINE DRAWN ON WHAT LANDS MUST BE PROTECTED. I DO NOT BELIEVE THE RESTRICTIONS DEFINED IN THE FINAL RULINGS ISSUED BY THE DEPARTMENT OF AGRICULTURE CREATE AN UNDUE BURDEN ON THE AGRICULTURAL COMMUNITY. I WOULD URGE LOCAL ASCS AND SOIL CONSERVATION SERVICE OFFICES TO COOPERATE AS BEST THEY CAN IN ADAPTING THE RULINGS TO SPECIFIC SITUATIONS. IN THIS WAY I BELIEVE WE CAN IMPLEMENT AN EFFECTIVE SWAMPBUSTER PROGRAM TO HELP PRESERVE OUR REMAINING WETLANDS.

MAJOR CONCERNS ALSO HAVE BEEN RAISED CONCERNING THE LOSS OF HABITAT FOR WATERFOWL. WE HAVE SEEN A CORRESPONDING DECREASE IN THE NUMBER OF WATERFOWL AS WETLANDS HAVE DECREASED. IT IS WELL KNOWN THAT DECREASING THESE WETLANDS ALSO DECREASES THE SIGHTS FOR MIGRATORY AND BREEDING HABITAT FOR THESE BIRDS. WE ARE ALREADY REALIZING THAT IT WILL BE NECESSARY TO SET ASIDE TRACTS FOR WETLAND DEVELOPMENT. THIS IS ONE OF THE MOST IMPORTANT MEANS OF REVERSING THE TREND OF DECLINING WATERFOWL POPULATIONS WHICH WE HAVE SEEN OVER THE YEARS.

IT IS MY HOPE THAT THE PROVISIONS CALLED FOR IN THE FINAL RULING BY THE DEPARTMENT OF AGRICUTLURE WILL NOT HINDER PRACTICAL FARMING OPERATIONS. WITHDRAWING WETLANDS FROM DEVELOPMENT WILL HELP TO PRESERVE THESE NATURAL RESOURCES WHICH SERVE AS VALUABLE HABITAT FOR WILDLIFE AND PROVIDE EXCELLENT RECREATIONAL ACTIVITIES. AS WELL, I BELIEVE THIS IS AN IMPORTANT PROGRAM FOR THE FUTURE OF OUR WATER QUALITY AND CONSERVATION EFFORTS.

Statement of Ronald A. Stromstad, President, North Dakota Chapter, The Wildlife Society

The North Dakota Chapter of The Wildlife Society is an organization of nearly 400 natural resource professionals, including wildlife biologists, natural resource managers, educators, conservation law officers, administrators and students. We have been involved in issues concerning North Dakota's natural resources for 25 years, with particular emphasis on protection, management and preservation of North Dakota's prairie wetlands.

On January 26, 1988, the Agriculture Subcommittee on Appropriations is holding hearings on the Swampbuster provisions of the 1985 Food Security Act (FSA). Our organization attempted to be placed on the agenda for oral testimony, but were informed that the schedule was filled. Therefore, I request that the following comments, which are specific to the Swampbuster provisions of the FSA, be included in the record.

1. Wetland Determinations - The definition of wetlands under the FSA is appropriate and proven to be applicable to the glaciated pothole area of the United States. Administratively it is critical that the present definition remain as written. No further exemptions other than those already allowed should be developed. The use of "normal circumstances" should not be used to eliminate protection for wetlands because of cropping history. Temporary wetlands are extremely important for their biologic and hydrologic values. Any change in the wetland definition, the exemptions, or "normal circumstances" will eliminate protection to a critical portion of the nation's wetlands. We support and encourage wetland determinations to be completed as soon as possible. Uncertainty and confusion may at least be partially reduced when a producer has a wetland determination completed on his farm. To make any changes in wetland exemptions, definitions, or in "normal circumstances" would be premature considering that wetland determinations have been completed on only a few farms.

2. Compliance - There has been virtually no enforcement of the compliance provisions of the FSA. Unfortunately, wetlands are continually being converted and farm subsidies are being paid to these same producers. Three changes would be appropriate to deal with this issue. First, the Agricultural Stabilization and Conservation Service (ASCS) must take over administrative responsibility for compliance. This must occur at the ASCS County Executive Director or State Administrator level. The present use of ASCS county committees has proven to be an ineffective means to address compliance. Second, the penalty provision allows no flexibility for varying degrees or circumstances of non-compliance. If adherence to the compliance provisions can be addressed through an administrative directive or change in organization, then changes in penalty provisions should be reviewed. Third, ASCS will be conducting a 10-15 percent spot check for compliance of Swampbuster provisions as they do with other programs. However, ASCS does not have the tools or expertise to be able to identify non-compliance of converted wetlands. This issue needs to be addressed through Soil Conservation Service or Fish and Wildlife Service involvement, it will not be adequately addressed through ASCS procedures. Compliance is a major requirement of this legislation and adjustments are needed to carry out a responsible program.

3. Wetland Conversion - The present process where planting in a converted or drained wetland is required for a producer to be in non-compliance needs to be corrected. Presently, wetlands are being converted and either not planted or planted to a non-agricultural commodity. In either situation, Swampbuster has not deterred the conversion of valuable wetlands. Wetland conversion only, not planting, should constitute producer non-compliance. Any wetland conversion that creates the potential for crop production should be a violation of Swampbuster.

4. Maintenance of Existing Drains - Presently a producer who has previously converted wetlands is allowed to maintain drainage ditches, continuing a practice of drainage that is inconsistent with the Congressional intent of Swampbuster. If new wetland conversion eliminates farm subsidies to producers, allowing wetland conversion to continue through maintenance on previously converted wetlands is inconsistent with legislative intent. Maintenance should not be allowed to continue and previously drained wetlands should be allowed to revert back to wetlands. This change would also lessen the inadequacies that presently exist between producers who have been good land stewards and protected their wetlands and those who have destroyed wetlands through previous wetland conversion activities.

5. Compensation - Producers that have not converted wetlands or who would possibly have wetlands that could be restored should receive some form of financial compensation. Similar to a Conservation Reserve Program where producers can bid in highly erodible lands, wetlands should be included in some form of a wetland reserve program. Funding through the federal Water Bank or other wetland programs would also be beneficial.

Changes in Swampbuster are necessary in order for the Congressional intent to protect wetlands to be fulfilled. Presently this is not occurring and wetlands are being converted while producers continue to receive farm subsidies. The changes suggested within this testimony would aid in making Swampbuster the legislation it was intended to be. Thank you for the opportunity to provide these comments.

Sincerely,

Ronald A. Stromstad
President

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STATEMENT OF THE DAKOTA RESOURCE COUNCIL

Mr. Chairman, members of the Committee, the Dakota Resource Council, a member of the National Save the Family Farm Coalition, is pleased to have this opportunity to comment on the Swampbuster provisions of the 1985 Farm Bill and are grateful for your interest in this important topic.

The Dakota Resource Council (DRC) is a grassroots membership organization of farmers and ranchers which is built on a history of concern for the wise use of our natural resources and the preservation of our rural communities. After the passage of the 1985 Farm Bill we launched a Farmland and Groundwater Preservation Project to further educate the public on the conservation provisions of the bill, to examine the effects of agricultural policy on farmland stewardship and groundwater protection, and to foster cooperation among a broad coalition to ensure protection of our farmland resources and the agricultural producer.

Currently producers are faced with much frustration and confusion concerning the Swampbuster regulations. Adequate and consistent answers regarding compliance are difficult to find. Agencies at the federal and state level may have contradictory information on wetland determinations or on farming activities compatible with the law. The application of the regulations are subject to variation among county officials and district conservationists, causing further misunderstandings. DRC wants to work together with all involved to implement these regulations, so that farmers do not feel run over in the process.

DRC proposes that a conflict resolution board be created to provide a forum for appeal once decisions are made. A farmer must have an avenue of appeal, particularly when the regulations are open for interpretation, or at least have this appearance.

The county ASCS Committee could be given the authority to review any decisions made regarding wetlands or drainage activities and should be able to make decisions on final determinations. Peer review has long proven to be the most effective means of promoting sound land and water stewardship. Farmers, working together in their local communities, are the best resource for fulfilling the desired goals of the Swampbuster legislation.

DRC would also like the Committee to reassess the penalties for non-compliance with the regulations. Over half of current farm income comes from farm program payments. The importance of these payments to the economic survival of most farmers does not need re-emphasis. Penalties for non-compliance which eliminate all of these program benefits are too severe. Producers are faced with the frightening possibility of losing all of their payments by accidentally or unknowingly violating the regulations. Until the confusion surrounding these regulations is clarified and final wetland determinations are made, penalties should be temporarily halted or at least revised.

DRC members place a high priority on wetland preservation and sound stewardship practices. DRC also believes that producers must have adequate compensation and be given economic security in to order to maintain these priorities. Economic pressure, such as that which results from the current farm bill, tends to discourage farmers' incentive for conservation measures. Under the current regulations a farmer may not be able to drain and seed a small depression or pothole. This is an economic loss which today's producer can ill-afford. Expansion and funding of the Water Bank program is one possible solution to this problem.

DRC will continue to work together with other grassroots farm groups in the country through the Save the Family Farm Coalition to address the broader issues facing rural communities. While we support the conservation goals mandated in the current farm bill,

we believe that the current market-oriented commodity programs which promote excess production, actually work against the sound conservation goals. This is the contradiction which must be addressed if we are to ensure long term environmental protection.

The Dakota Resource Council appreciates this opportunity to present our concerns and suggestions and we would be happy to provide any additional input or information that the Committee might request.

Statement of Laurence R. Jahn, President, Wildlife Management Institute

The Wildlife Management Institute appreciates the opportunity to submit for the official record this statement on the implementation of the swampbuster provisions of the 1985 Food Security Act.

Founded in 1911, the Institute continues to advance restoration and improved management of natural resources, especially wildlife.

The Institute supports strongly the swampbusting provisions of the 1985 Act. Our personnel have been involved deeply with implementing these provisions. They also are helping to plan and complete evaluations that will identify program benefits and any changes that may be needed in the law or regulations.

Several proposals have been made in recent weeks to make some major changes in the final rules for Highly Erodible Land and Wetland Conservation issued by the USDA on September 17, 1987. Overall, the Institute supports those rules and believes it would be best to hold the much needed swampbuster provisions intact at this early stage of program implementation. Fine-tuning by Congress should be considered only after accumulated experience and information demonstrate clearly that changes are justified. The following comments are submitted to address many of the concerns and proposals that have been raised recently.

Wetland Determination

As defined by the 1985 Food Security Act, a wetland is

> land that has a predominance of hydric soils and that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions.

In developing the language which was used in the final version of swampbuster, the House Committee on Merchant Marine and Fisheries recognized that a "soil or substrate that is at least periodically saturated with or covered by water" can produce hydric soil conditions necessary for categorizing the area as a wetland (H.R. Rep. No. 99-271, Part 2, 16:1985). With regards to other wetland criteria requiring the area to support hydrophytic vegetation under "normal circumstances," the House Committee went on to state:

> Within the definition of the term wetlands, the term "normal" is intended by the committee to make clear that areas that are saturated by surface or groundwater but have had wetland vegetation destroyed are nevertheless considered wetlands for the purpose of this Act. The term normal is not intended to require any particular frequency or duration of flooding, saturation or ponding.

Type I wetlands, characterized as being seasonally flooded basins or flats, are fully included in this Congressional definition of wetlands when inundated long enough to produce hydrophytic vegetation and/or hydric soils.

In North Dakota and elsewhere, Type I wetlands can sometimes be farmed using normal tillage practices during all or part of years when the wetland basins are dry. This practice is not inhibited by swampbuster regulations and was fully endorsed by the Senate Committee on Agriculture, Nutrition and Forestry during the development of the 1985 Farm Act (Sen. Rep. No. 99-145, Part 1, 304:1985).

> The Committee does not itend that a person producing an agricultural commodity on wetlands be ineligible for participation in certain farm programs, if production is possible as a result of natural conditions and if actions of the producer do not destroy the wetland characteristics. Example of this natural condition include areas of the prairie pothole region where production of an agricultural commodity in such potholes is feasible and practicable during dry years, without destroying the wetland characteristics. During the wetter years, these potholes will exhibit true wetland characteristics and will again provide wetland functions.

Under these guidelines, neither were agricultural producers denied the right to continue conventional farming practices on these areas, nor were they given liberal policy to drain and destroy the wetland characteristics of the areas if they could be cropped under a sequence of drought years. However, the integrity of wetland basins should be maintained to provide wetland vegetation in seasons or years of adequate precipitation.

The importance of Type I wetlands to wildlife, particularly waterfowl, and to the overall hydrological conditions of glaciated regions, such as North Dakota, also is well documented.

The prairie pothole region, often referred to as America's duck factory, once probably produced 15 million ducks each year. Although wetland drainage in the Dakotas, Minnesota and Montana has reduced waterfowl production to less than half of its original level, this critical breeding area still produces about 87 percent of all the ducks bred in the lower 48 states. Annual waterfowl production is directly correlated with the number of wetland potholes scattered across this prairie region. And during wet years, it is the smallest (less than 1 acre) Type I wetlands which become most critical to breeding pairs--producing 10 to 15 times more ducks per acre than larger water bodies.

The inclusion of Type I wetlands, such as playas, potholes or other seasonally flooded areas, in wetland definitions is repeatedly documented in Congressional Committee reports, throughout the language of the Food Security Act, and in regulatory rulings of the USDA. The ecological importance of these areas to waterfowl and other wetland species, as recharge areas for ground-water aquifers, and for controlling destructive seasonal floods further justifies their inclusion in swampbuster definitions and regulations. No additional exemptions beyond those found in the September 17, 1987 federal regulation should be allowed for Type I wetlands or other wetland basins that may have been cropped when dry.

Compensating Wetland Protection/Enhancement

Agricultural producers who have not converted wetlands or who have wetlands that could possibly be restored should receive some form of financial compensation as encouragement for enhancing wetland values.

The Conservation Reserve Program (CRP) was established by the Farm Act to provide farmers with financial incentives to remove highly erodible lands from production for at least 10 years. If goals are reached, the CRP will establish vegetative cover on 40-45 million acres of croplands and help reduce soil erosion, improve water quality and enhance wild living resources.

Participation in the CRP by North Dakota farmers has been high with around 8,000 producers enrolling nearly 1.5 million acres, or about half of their eligible land, into the Reserve. Farmers voluntarily participate by submitting a bid for annual rental payments to the government. In 1988, North Dakota farmers will receive more than $55 million in annual CRP rental payments averaging approximately $38 per acre. Farmers also are eligible to receive a cost share payment through ASCS to pay half of the cost for initial establishment of approved vegetation.

The CRP could be used to compensate farmers for protecting and enhancing wetlands. Legislative action similar to that proposed by Senator Sam Nunn (S. 1521) could expand the CRP and allow wetlands, as well as highly erodible croplands, to be enrolled. Eligibility should be based on wetland determinations made by the Soil Conservation Service in close consultation with the U.S. Fish and Wildlife Service. In establishing enrollment criteria for wetlands, preserving and maintaining the integrity of the entire wetland basin should be given highest priority. Sufficiently large buffer strips surrounding these basins are necessary to provide nesting cover for wildlife and to "block out" areas for farming and tillage convenience.

Alternatively, an expansion of the current Water Bank Program (WBP) also could be used to compensate farmers for protecting and enhancing wetlands. Under the WBP, 10-year agreements are entered into with landowners and operators in important migratory waterfowl nesting, breeding or feeding areas for the conservation of specified wetlands. Wetlands and adjacent upland areas in 10 states are eligible for WBP. Since 1977, North Dakota farmers have enrolled

nearly 190,000 acres in the WBP and received more than $3 million in annual rental payments. This represents more than one-third of the entire WBP enrollment. In 1987, annual payments for WBP agreements averaged nearly $17 per acre.

Administration and Enforcement

Several concerns and misunderstandings have been voiced by farm groups, conservation organizations, state and federal agencies, and other entities regarding the administration of swampbuster provisions and enforcement of swampbuster violations/penalties.

Implementation of swampbuster is the dual responsibility of SCS and ASCS. The technical staff of the SCS make determinations of whether a particular area is a wetland, whether crop production can occur on it under drought or other natural conditions, whether drainage will cause only minimal impact on the wetland, and in some cases whether a partially converted wetland is subject to seasonal ponding or flooding for a significant part of the growing season. In making its "minimal impact" determinations, SCS consults with the Fish and Wildlife Service (FWS).

To enforce the regulations, ASCS makes determinations on whether commodities are being produced on particular fields, where field boundaries lie, when drainage has been commenced, and whether wetland conversions are exempt as "third party" projects. In making both "commenced" and "third party" determinations, ASCS must consult with FWS.

A formal appeals process is available to any person who has been or would be denied program benefits as the result of any determination made under the swampbuster rules. An estimated 1,640 appeals of technical wetland determinations have been received by SCS nationwide, as landowners and operators have learned about the new swampbuster procedures. Almost all appeals have been reconciled at the field level. County ASCS offices review and decide all violation appeals.

Several North Dakota farm groups have recommended that ASCS county committees be allowed to make all swampbuster appellate decisions, including technical decisions regarding wetland determinations. This request could undermine all professional attempts to delineate wetlands and would exacerbate existing problems already associated with ASCS's unwillingness to strongly enforce swampbuster provisions.

County ASCS committees are made up of local farmers elected by their associates. Committee members typically do not have the training necessary to make technical decisions regarding SCS wetland determinations. Moreover, ASCS committees have been embarrassingly complacent at investigating potential swampbuster violations. FWS has brought 150 "suspected" violations of the law to the attention of county ASCS officials in North Dakota and 270 cases in South Dakota. Reportedly, local ASCS officials to date have not adequately investigated any of these possible violations in either state.

ASCS must develop greater administrative effectiveness in administering and enforcing swampbuster provisions. This must occur at the ASCS County Executive Director or State Administrator level. ASCS in cooperation with SCS and FWS should begin 10-15 percent spot checking for compliance with swampbuster, as is done with other programs.

Other agricultural-related interests have suggested that farmers not be denied program benefits until final confirmation of potential swampbuster violation. Present USDA policy is to withhold benefits whenever any potential program violation (not just swampbuster) occurs. Given reports that only two agricultural producers have been denied farm program benefits in the entire U.S., these concerns seem premature.

Agricultural producers who inadvertently convert a wetland should be allowed to restore that wetland at their own expense and in a reasonable time period. Examples of this proposal would be allowing a producer to plug a converted wetland drain or level a ditch to SCS/FWS specifications. Program crops must not be produced on the wetland before approved restoration is completed. Routine mitigation of any conversion through the creation of new wetlands should not be allowed. Prudent application of this proposal could occur without any major revision of federal regulations.

By law, if program crops are produced on any wetland converted after December 23, 1985, the agricultural producer must forfeit all federal farm program benefits for that crop year. This penalty must be applied in its fullest extent if swampbuster is to be successful as a deterrent for wetland drainage and conversion.

Discounting the penalty to "make the punishment fit the crime" has been suggested by several farm groups. Under this scenario, the percentage of program benefits denied would equal the ratio of converted wetland acreage to the total farming base of the agricultural producer. Because critical wetland habitats are typically such a small fraction of the entire farm acreage, swampbuster penalties for drainage and conversion could become so diluted as to be ineffective as deterrents. Moreover, federal farm program benefits are forfeited only for years when commodity crops are grown on the converted wetlands. Under existing law, farmers need only to plant the drained area to a grass or other permanent seeding to avoid further penalities. In sharp contrast, the ecological value of a wetland, once it is drained, may be lost forever.

It is perfectly reasonable to expect some tension and difference in view on implementing swampbuster regulations. But these precedent-setting provisions are needed to meet U.S. responsibilities under Migratory Bird Treaties and to advance sound resource use and should not be changed without justifiable cause. What is needed is the administrative initiative from USDA agencies to implement the regulations fully, fairly and in a timely fashion.

Great strides have been made to integrate conservation dimensions into federal food and fiber commodity programs. The Institute pledges to support these efforts to develop sustainable, integrated management of agriculture and natural resources.

Statement of Peter Kilian Weber, Agricultural Policy Division, National Audubon Society

The National Audubon Society appreciates this opportunity to submit this written testimony for the record of the hearing on the implementation of the swampbuster provision of the Food Security Act of 1985.

Wetland preservation was selected by our 500,000 members as a high priority issue, and therefore we support programs such as swampbuster which protect wetland habitat, especially when integrated into a comprehensive conservation effort. The inclusion of swampbuster in the conservation title of the 1985 Farm Act combined the growing recognition of the value of wetlands with the need to reduce commodity crop surpluses. The National Audubon Society was involved at the outset in the efforts to create and enact the swampbuster provision of the Food Security Act of 1985, and we believe a fair and comprehensive structure was developed and put into law.

Once signed into law, the rule making process proved to be complex, and at times contradictory messages were issued. We believe that because of these and other problems, some farmers were confused about the intent of Congress and the law. The ensuing frustration is understandable, as it would be with the integration of any new direction imposed on an existing system. However, the adjustment difficulties currently experienced by all parties in the integration of natural resource conservation with commodity programs is not sufficient reason to tinker with a new program only four months after the final regulations were published. Furthermore, to try to alter the conservation title of the 1985 Farm Act when both farmers and the Agriculture Department are adjusting to the new program could reverse the upward trend now occurring throughout the agricultural sector, which is now beginning to raise prices for farmers and lower our grain and other commodity crop surpluses.

For the record of this hearing, we will focus on three issues regarding swampbuster: the intent of Congress, the promulgation of the rules, and administrative implementation. After a careful review of the process to date, we believe that implementation of the complete conservation title of the 1985 Farm Act, including swampbuster, should proceed as established by law and promulgated in regulations, and that the administration of the law should be brought up to speed in all areas so that farmers who conserve their wetlands are not put at a disadvantage relative to farmers who exploit their wetlands.

Legislative History

Some people would like to believe that swampbuster was a last minute add-on, slipped into the 1985 Farm Act. Nothing could be further from the truth. The legislative history for swampbuster is detailed and quite well developed, with deep roots in a growing national concern for wetlands.

The federal government has concerned itself with wetlands as far back as the Swamp Land Acts of 1849, 1850, and 1860. At that early date, however, wetlands were regarded as wasteland which, if altered in some manner or another, could be made useful to society. This attitude led to the wholesale subsidized destruction of millions of acres of wetland. Because bird watching and duck hunting are deeply integrated into American culture and wetlands are the habitat of migratory birds, sufficient concern developed to attract the attention of Congress, but the passage of the Migratory Bird Conservation Act of 1929 had little effect because few appropriations were made, and federal subsidies continued to encourage wetland conversion.

By 1958, agricultural expansion, fueled by cost-sharing, tax write-offs, and agriculture program benefits, was responsible for the conversion of more and more wetlands -- especially in the prairie pothole region of the country. Recognizing that already established programs could not keep pace with the loss of these waterfowl production wetlands, Congress amended the Migratory Bird Stamp Act of 1934 and passed the Wetlands Loan Act of 1961. Nonetheless, only a small percentage of the potholes could be acquired, and wetland conversion continued, as before, under federal subsidies.

Because the early attempts to protect prairie potholes and other wetlands were largely unsuccessful, new methods were sought. In 1962, Congress amended

the Soil Conservation and Domestic Allotment Act and incorporated the idea of not providing federal assistance for wetland drainage in North Dakota, South Dakota, and Minnesota if the Secretary of the Interior determined it harmful to wildlife. Although this provision did not significantly slow wetland conversion, it introduced the concept of no longer subsidizing wetland conversion. By 1975, SCS had adopted the beginnings of a wetland protection policy, and after President Carter issued his 1977 executive order on the protection of wetlands, SCS strengthened its policy, and ASCS ended its cost-sharing for wetland drainage.

Besides the concern for wildlife, greater public awareness of the "public works" values (water purification, flood control, ground water recharge) and beauty of wetlands led to the enactment of Section 404 of the Federal Water Pollution Control Act of 1972 (out of which the wetland definition for swampbuster emerged), and later the Coastal Barrier Resources Act of 1982.

Nonetheless, prairie potholes continued to attract attention and money with the passage of the Water Bank Act of 1970. Congress once again affirmed its dedication to wetland conservation in the Water Bank's authorizing language by stating "the Secretary [of Agriculture] shall have the authority to enter into agreements with landowners and operators in important waterfowl nesting and breeding areas for the conservation of water . . . or other wetlands. . . ."

The value of the prairie pothole wetlands to the state of North Dakota can be seen in the consistent flow of money from the Water Bank: $3,185,000 in FY87 -- more than any other state.

Nevertheless, it would have been unrealistic to expect taxpayer money to save every wetland, especially when competing with continued federal subsidies and tax breaks for wetland conversion. Finally, increased recognition that national wetland and agricultural policy were working at cross purposes came to the forefront with the Farm Act of 1985.

The Development of Swampbuster Language

The environmental and fiscal effects of commodity programs and tax policy became a part of the debates preceding the 1985 Farm Act. The federal incentives offered farmers resulted in expensive surpluses, and drew millions of acres of fragile lands into crop production, causing record soil erosion rates, and resulting in the loss of an estimated 400,000 acres of wetland per year. The increased recognition of the value of our wetland and soil resources, combined with the economic impact of surplus production, brought about the integration of resource and commodity programs in the language of the conservation title of the 1985 Farm Act, as well as the Tax Reform Act of 1986.

For this section, please refer to Appendix 1, Swampbuster Legislative History and Public Outreach. This chronology is a summary of events which led to inclusion of swampbuster in the 1985 Farm Act. It clearly demonstrates that out of past precedent and concerns, the development of the swampbuster language involved a wide range of parties, was very well publicized, and was fully considered, along with sodbuster, to assure that concerned parties had ample opportunity for input into the process, and that the final language which the Conference committee crafted, reflected the intent of Congress.

Reviewing the record, it is clear that swampbuster developed most immediately as a natural extension of the sodbuster concept to deny federal subsidies to those who break out fragile land for crop production. To allow wetlands to be converted for commodity production while highly erodible range was declared off limits, or to establish a penalty which was less stringent for one than the other, would have been inconsistent and unfair. Instead, there was unanimity among Senators, Representatives, farmers, conservationists, and others that both provisions were needed to halt the further expansion of agricultural at the expense of our natural resources, particularly in light of the need to reduce production levels through the Conservation Reserve and other set-aside programs.

At the House and Senate hearings on conservation in the 1985 Farm Act, inclusion of a swampbuster provision was brought up early on and discussed at length. In addition to Congressional members speaking in favor of swampbuster, a total of 12 groups requested that the benefits of federal programs be denied to producers who convert wetlands for crop production. Farmer organizations also spoke in favor of swampbuster.

Among swampbuster's most vocal proponents were:

- Senator Kasten
- Senator Zorinsky
- Representative Daschle
- Representative Wolpe on behalf of Representatives Udall, Sieberling, Kilde, Richardson, Moody, Bryant, Kostmayer, Follietta, Horton, Carper, Edgar, Mikulski, Florio, Leach, Boucher, Downey, Leland, Slattery, Levin, Oberstar, and Tauke.
- The Sierra Club
- The National Audubon Society
- The National Wildlife Federation
- The Wildlife Management Institute.

As hearings opened the subject for debate, farm groups were asked to offer their opinions on inclusion of swampbuster. Swampbuster was further publicized and described in editorials, letters from members of Congress, newsletters, speeches, press releases, and many articles, giving potential opponents ample opportunity to hear about swampbuster and to offer their input.

Both houses developed swampbuster language and included it in the bills they reported out of the agriculture committees. The House version was introduced by then Representative Daschle and was extensively discussed in full committee mark-up. In the Senate, both Senator Kasten and Senator Zorinsky introduced swampbuster legislation, and in the Senate Agriculture Committee mark-up of the conservation title, the members discussed and developed their swampbuster language from the two proposals.

The definition of wetland, in particular, received extensive consideration in the Senate mark-up. Besides Senators Kasten and Zorinsky, Senators Boschwitz and Cochran had also included wetland definitions in their bills. Assistant Secretary Pete Myers participated in the development of the compromise definition, which he explained to the committee would include prairie potholes. Senator Zorinsky stated that it should. The House Report 99-271 Part II also reflected the intention of the House to include prairie pothole wetlands.

In Conference, the conferees adopted the House's basic definition of wetland (adopted from the Army Corps of Engineer's Section 404 wetland definition), and included the Senate bill's definition of hydric soil and hydrophytic vegetation. Which wetlands are included under swampbuster is ultimately based on the criteria for hydric soil and hydrophytic vegetation identification.

The final language is explicit in conveying Congress' intent to include seasonal wetlands, such as prairie potholes, within swampbuster's purview. In the wetland definition, the language refers to hydric soil "inundated or saturated by surface or groundwater at a frequency and duration sufficient to support . . . hydrophytic vegetation," that is, in order to be wetland, it does not have to be wet all year round.

The definitions for hydric soil and hydrophytic vegetation contain similar language, reenforcing the understanding that seasonal (Type I) wetlands are to be included.

Another indication of Congress' thorough consideration of the swampbuster language is evidenced in the development of exemptions to assure fair implementation, including an exemption which allows a producer to plant a wetland in its natural state. Under this exemption, if a producer has planted a field in the past, he has no fear that he continue to do so, provided he does not drain or otherwise alter it. Furthermore, Congress included an exemption which allows seasonal wetlands, such as prairie potholes, to be planted in dry years, but the law and the report language clearly states that the producer cannot alter its natural characteristics in such a way that in normal years it will not re-emerge as a valuable wetland.

Further indication of Congress' intent to eliminate government subsidies for wetland conversion can be found in Senators Boren and Grassley's introduction of S.1786, the Cultivation of Highly Erodible Lands and Wetlands Tax Act, on October 23, 1985. Senator Boren described the Agriculture Committee's inclusion of sodbuster and swampbuster as "one-step in a two-step process." S.1786 was adopted by Congress and included in the Tax Reform Act of 1986.

In summary, the swampbuster provision of the 1985 Farm Act was the culmination of years of growing concern over the preservation of wetlands, merged with the economic need to reduce crop surpluses. Its provisions were thoroughly and openly considered in both the House and Senate, as well as in Conference. Swampbuster did not emerge out of the blue.

The Rule Making Process

For this section, see Appendix 2, the Chronology of Implementation of Swampbuster. This chronology highlights the steps taken to put swampbuster into practice. Reading through the process, it becomes clear why some farmers became frustrated with the process, for it was complicated, and occasionally contradictory messages were issued by both politicians and USDA. Furthermore, USDA experienced internal problems, having to overcome bureaucratic resistance and the Herculean task of educating its own personnel to implement the law.

Nonetheless, both the conservation and the agriculture communities were well aware of the process and had ample opportunity to contribute comments for the development of the final rule. In total, 2,696 individuals, corporations, environmental groups, water districts, financial institutions, members of Congress and others submitted comments on the interim rule, and in the final rule, USDA documented every contentious point.

Discussion of Elements of the Final Rule Vis A Vis the Law and Congressional Intent

1. Wetland Determination

Section 1201 of the 1985 Farm Act provides for the definitions of wetland, hydric soil, and hydrophytic vegetation. Reflecting Congressional intent to include Type I, seasonal wetlands, all three definitions refer to the possibility of periodic flooding, saturation or ponding.

In its rule making procedure, USDA adopted these definitions and, as directed, developed criteria for the determination of a "predominance of hydric soils" and a "prevalance of hydrophytic vegetation."

In the interim rule, the USDA stated that the listing of hydric soils was set forth in the publication "Hydric Soils of the United States 1985" after

five years of work by the National Technical Committee for Hydric Soils, chaired by SCS. It then went on to discuss the predominance test, concluding its discussion by stating "[t]his test of predominance was chosen because other alternatives considered do not protect significant wetlands such as potholes. . . ."

To determine if the hydric soil "under normal circumstances does support hydrophytic vegetation," the USDA chose the "National List of Plant Species that Occur in Wetlands," developed by the National Wetland Plant List Review Panel, to be used in conjunction with a statistical test of weighted averages. After the discussion of its choices, USDA concluded by stating: "The Department considered a number of methods to determine prevalance of hydrophytic vegetation. . . . The chosen evaluation process is primarily based upon research conducted by the Fish and Wildlife Service, U.S. Department of the Interior, and researchers at North Carolina State University. The weighted average method has been selected to determine the prevalence because it is relatively simple to perform, is as accurate as other methods, and is objective."

In sum, USDA put significant effort into the development of criteria and tests for the determination of wetlands, and was conscientious with respect to the intent of Congress, specifically making sure that prairie potholes and other Type I wetlands were included. Confusion which surrounded the wetland definition -- and therefore, which wetlands are covered by swampbuster -- resulted more from misinformation concerning Congressional intent than farmers' lack of knowledge of their land.

2. Converted Wetland.

Because the enforcement mechanism is based on the identification of a converted wetland, this definition is crucial to swampbuster. The Farm Act defined a converted wetland as a wetland manipulated for the purpose of, or to make possible, production of an agricultural commodity if such production was not possible before such action. It further goes on to exempt any wetland which can be planted as a result of natural conditions, or if not assisted by the producer.

These exemptions directly address the concerns of North Dakota farmers who have for years planted the same fields and are now concerned that their continued production on their land could result in the loss of program payments. If the farmer has been able to produce on it in the past and he does not start any new drainage work now, he will not have a converted wetland. Furthermore, when wetlands do dry up, such as seasonal potholes in a dry season, he can plant it, as long as he does not alter it.

The converted wetland definition was incorporated into the final rule.

3. Program Ineligibility.

From the perspective of a conservationist concerned about the loss of wetlands, the law provides a loophole which can allow for the further loss of wetlands: a producer only becomes ineligible if he plants and produces a crop on a converted wetland. This means a producer could convert a wetland but not plant a commodity crop, and he would not lose his payments. Of course, it is unlikely that a producer would expend the time and money to drain a wetland if he could not use it for crop production, but the potential does exist for a producer to take a gamble that a conversion will be exempted or even overlooked. If the wetland is determined to be a converted wetland, he need only refrain from planting it, and he retains his program benefits. The wetland, however, could nevertheless be lost. In some cases, restoration is next to impossible.

This loophole gives the producer more latitude to convert wetlands, and is also in the final rule.

4. Third Party Drainage.

The third party drainage exemption which appears in the law under the converted wetland definition was included under the Exemption for wetlands

section of the final rule. This exemption is also regarded by conservationists as a potential loophole, but in the final rule the USDA drew the language tightly enough to reasonably assure that it will not be abused.

This exemption was included in the law to prevent producers from losing program eligibility if an outside party, such as a neighbor or a drainage district, undertook a drainage or diversion project which dried up his wetland, enabling him to plant a crop. In this case, the party who drained the wetland would have to answer to the law.

5. Conversion prior to December 23, 1985.

This provision of swampbuster, which exempts wetland conversion commenced before the date of enactment of the Farm Act, December 23, 1985, has been a major point of controversy. The issue of "commenced" creates a large window for the continued conversion of wetlands. We recommend that attention be focused on this exemption under which thousands of acres have been converted since the passage of the Farm Act on the grounds that conversion began before December 23, 1985.

From the perspective of the farmer, this exemption provides more than enough latitude to assure that contractual commitments made prior to the passage of the Farm Act are not broken and that investments are not lost.

Because a change in wording of this exemption could have grandfathered in thousands of additional acres, the contradictory messages issued by USDA on this point caused a particularly frenzied confusion in both the agriculture and conservation communities. To have simply granted an exemption on the basis of a vote at a water district meeting would have opened the law for excessive abuses.

The final rule, which requires specific contractual and/or substantial monetary commitments, holds closer to the intent of the legislators and is sensitive to farmers' prior obligations.

6. Maintenance of drainage.

As part of the grandfather clause exempting wetlands which were drained before enactment of the Farm Act, the final rules allow for the routine maintenance of a drainage system, providing that no additional acres are brought into production. Although not specifically provided for in the law, it assures that swampbuster does not preclude annual clean out of drains, but prohibits activation of abandoned drains. The inclusion of this provision indicates USDA's sensitivity to the difference between active and abandoned drainage systems.

7. Minimal impact.

This exemption in swampbuster, providing for wetland conversion of minimal impact, is likewise a potential loophole, if applied in a wholesale manner to a single class of wetlands -- for example, Type I prairie potholes. The House Report, however, was explicit in stating that "[i]t is to be applied with great caution in recognition that most of this country's remaining wetlands are of considerable value." It is our understanding that this exemption, which was naturally included in the final rule, will be applied very rarely and only in full consultation with the Fish and Wildlife Service, as was stipulated in this House Report. Implementation should proceed as such, being that liberal application of this exemption could cause small, Type I wetlands in the prairie pothole and other regions to be "chipped away" (as the House Report put it) to nothing.

In conclusion, the final swampbuster rules are reasonably consistent with the intent of Congress. The wetland definition in particular was a difficult task because of the diversity of wetland types, but USDA developed objective criteria and tests which follow the spirit of the law. The development of the "commenced" exemption was particularly confusing, but eventually USDA promulgated regulations which allow farmers several exemptions, and which, over time and through strict implementation, could end budget outlays for the destruction of wetlands.

Implementation of Swampbuster

Audubon's major concern is fair and consistent implementation of the law. If swampbuster is enforced in some states but not others, wetlands will continue to be lost and the farmers who do comply will be penalized because they will be put at a relative economic disadvantage. On such an unlevel playing field the goals of the 1985 Farm Act cannot be met.

Thus far, there is little evidence of any enforcement, especially in North Dakota. Farmers there continue to drain wetlands, and not one North Dakotan farmer has lost his payments. Yet, North Dakota farm groups are complaining and seeking changes in the law.

Individual accounts from North Dakota consistently report that swampbuster has had little effect on the drainage of new wetland areas. In fact, the first year after passage of the Farm Act, observers saw little change in drainage activity. It was not until the fall of 1987 that drainage activity increased. The reason for the increased activity, however, was not in reaction to the threat of swampbuster enforcement, rather that it was a fair weather fall in North Dakota, and the farmers had the time and conditions to take their equipment into the fields to drain wetlands.

Non-exempt conversions, however, can be determined. ASCS annually photographs fields with 35mm film and keeps the past seven years on file. By comparing slides, SCS can bring violations to the attention of producers, and the producers can lose their program eligibility.

In North Dakota, over 90% of the farmers rely on the commodity programs, receiving over $700 million in indirect payments in 1987. (See Appendix 3, Statistical Information and Background on North Dakota.) It is therefore understandable that they fear future loss of payments for past swampbuster violations, and have come to Washington seek relief and exemption.

Currently both SCS and ASCS administer swampbuster, as provided for by law, in consultation with the Fish and Wildlife Service and other agencies. Wetland determinations, in particular, require the combined efforts of SCS and Fish and Wildlife. SCS has considerable technical expertise to make hydric soils determinations. The test for predominance of hydrophytic vegetation requires the technical expertise of both SCS, and the Fish and Wildlife Service. Perhaps the process has not been as fast as it could have been, but as farmers come to understand swampbuster's provisions, the administrative burden on SCS and ASCS will lighten and implementation should go more smoothly.

Conclusion

Congressional oversight is needed to assure that swampbuster is being enforced as intended, applying equally to North Dakota as well as all other states. Unfortunately, loopholes in the law and regulations exist. For now, however, the administrators of the law should be given time to implement the regulations to end the further loss of wetlands at taxpayer expense.

> The overwhelming support for the conservation titles of the farm bill was testimony to the work of Senator ARMSTRONG and other Senators who are deeply concerned about the loss of top soil and wetlands in this country. The issue is now no different that it was in 1985 -- we must ensure that the Nation our children and grandchildren inherit is worthy of inheritance while also ensuring the future productivity of America's greatest natural resource -- our agricultural needs.*

* Senator Dale Bumpers (D-AR), April 7, 1987, Senate floor debate on amending the Conservation Title of the Food Security Act of 1985.

[APPENDIX 1]

Swampbuster Legislative History and Public Outreach

4/9/84 Central Flyway Council (composed of state wildlife agencies of Colorado, Kansas, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Wyoming) passed resolution at March 25, 1984 meeting to "make wetlands . . . and other such non-cropland acres ineligible for receiving price supports, land retirement payments, commodity loans, and storage payments if converted to cropland."

1/8/85 National Governors' Association, Committee on Agriculture and Rural Development, Staff Advisory Council meeting. Commissioner of Agriculture from Tennessee, William Walker, recommended adding swampbuster when enacting sodbuster in the 1985 Farm Bill.

4/4/85 House Agriculture Committee hearing on soil conservation provisions of 85 Farm Bill. Oral and written statements in favor of swampbuster made by Rep. Wolpe on behalf of himself and a bipartisan group of 21 other representatives (Udall, Seiberling, Kilde, Richardson, Moody, Bryant, Kostmayer, Follietta, Horton, Carper, Edgar, Mikulski, Florio, Leach, Boucher, Downey, Leland, Slattery, Levin, Oberstar, Tauke)

- Also by Sierra Club, National Audubon Society, and National Wildlife Federation. The Minnesota Department of Natural Resources and the International Association of Fish and Wildlife Agencies urged the removal of incentives for the coversion of wetlands to cropland. Including testimony submitted for the record, ten different groups requested such a provision.

- Rep. Daschle questioned witness panels if sodbuster provisions should be extended to a swampbuster section.

4/15/85 Senate Agriculture Committee hearing on conservation title of the 1985 Farm Bill. Oral and written statements in favor of swampbuster made by National Audubon Society, Sierra Club, and Chesapeake Bay Foundation. Wildlife Management Institute spoke in favor of removal of federal incentives to convert wetlands.

4/18/85 House Agriculture subcommittee on wheat, soybeans and feed grains hearing. Sierra Club testified in favor of swampbuster.

4/23/85 House subcommittee marked up bill w/o swampbuster.

4/25/85 Senate Agriculture Committee field hearing held by Senator Zorinsky in Nebraska. Farmers testified in favor of swampbuster.

5/1/85 Senator Kasten introduced S.1035 containing swampbuster provision. Senator Zorinsky introduced S.1051 containing a similar swampbuster provision.

5/8/85 Rep. Daub (R-NB) introduced H.R.2425 to eliminate tax shelters for clearing land and draining swamps. Referred to House Ways and Means Committee for consideration of tax reform. Cosponsored by Lightfoot, Beirueter, V. Smith, McEwen.

5/13/85 Wildlife Management Institute letter to Lugar urging support of swampbuster.

5/22/85 Audubon letter to Lugar urging inclusion of swampbuster in Lugar's S.1000.

5/22/85 Editorial in Washington Post urging enactment of conservation reserve, sodbuster and swampbuster, cited Kasten and Zorinsky's swampbuster provision.

5/29/85 Congressional Research Service issued background document on swampbuster.

6/4/85 Letter to Sen. Zorinsky from Soil Conservation Society of America, American Farmland Trust, National Association of Conservation Districts, National Farmers Union, National Grange, National Farmers Organization, Sierra, Audubon, International Association of Fish & Wildlife Agencies urging him to go to bat for all conservation provisions.

6/28/85 Press Release from USDA on Secretary Block's conservation reserve proposal for 20 million acres for 10 years.

7/9/85 Full House Agriculture Committee in marked-up of H.R.2100, accepted Daschle's swampbuster amendment in conservation title by voice vote.

7/12/85 Senate Agriculture Committee mark-up of swampbuster began.

7/16/85 National Association of Conservation Districts' Tuesday Letter went out to all districts across the nation on with the announcement of swampbuster on front page.

7/18/85 Full Senate Agriculture Committee in mark-up of S.1714's conservation title considered four senators' proposals for the wetland definition in swampbuster. Pete Myers discussed compromise definition: included prairie potholes. Zorinsky stated that prairie potholes to be included. Sen. Kasten also spoke for swampbuster. Various provisions approved.

7/31/85 Full House Agriculture Committee accepted Daschle's swampbuster clarifying amendments by voice vote. Rep. Lewis's amendment, that wetlands not be just wet soil, was accepted by voice vote. Rep. Franklin's amendment to exempt small wetlands not predominantly wetland was rejected by 15 to 11.

8/4/85 Soil Conservation Society of America (Now Soil and Water Conservation Society) news release of Secretary Block's keynote at annual convention in St. Louis. News release cited sod and swampbuster provisions proposed for bill.

8/9/85 News release from House Agriculture Committee summarizing provisions tentatively approved by the full committee. Swampbuster fully described.

8/9/85 Letter from Rep. Hal Daub, (R-NB) asked Audubon to support his amendment to the Tax Reform Act to deny tax benefits to sodbusters and swampbusters. Definitions to be same as in farm bill. Byron Dorgan (D-ND) cosponsored Daub's proposals in Ways and Means Committee.

8/11/85 Audubon sent out alert to activists urging support of swampbuster in Farm Bill.

9/13/85 House Agriculture Committee Report 99-271, Part I, on H.R.2100, ordered to be printed. Swampbuster section discussed, including value of prairie pothole wetlands.

9/18/85 House Merchant Marine Committee Report 99-271, Part II, on H.R.2100, ordered to be printed. Concurred with Agriculture Committee and offered clarification on the wetland definition and other matters.

9/20/85 Full House began consideration of H.R.2100.

10/8/85 Full House passed H.R.2100, which included swampbuster provision by 282 to 141.

10/21/85 Group letter from conservation and farm groups to Senators urging support of S.1714, Senate Farm Bill vehicle including swampbuster.

10/23/85 Sens Boren and Grassley introduced S.1786 to amend Tax Code to disallow certain credits and deductions to preclude capital gains treatment regarding the use and disposition of certain highly erodible lands and wetlands. Tied to farm bill, called second step in 2-step process.

- Boren told the Senate in his introductory remarks, "If we are going to develop sound agricultural policy, we have to go beyond the purview of the Agriculture Committee. We must begin to address the problems of agriculture that are caused by the tax code."

10/24/85 Letter from Audubon to Rep. Daub supporting tax reform efforts to complement Farm Bill conservation provisions (H.R.2425).

10/25/85 Full Senate began consideration of S.1714.

11/23/85 Full Senate substituted H.R.2100, as amended, for S.1714, by a vote of 61-28.

11/26/85 News release by Senate Agriculture Committee on Farm Bill. Swampbuster included and cited in news summary.

12/18/85 Both the Senate and the House adopted the Conference Report.

12/23/85 Food Security Act signed by the President.

12/23/85 Editorial in New York Times endorsing the conservation title, including swampbuster. Praised swampbuster authors.

1/16/86 Audubon sent out alert to activists on tax reforms for wetland conversion.

2/20/86 Audubon submitted statement to Senate Finance Committee on S.1786.

10/22/86 Tax Reform Act of 1986 signed by the President. Included complement to conservation title of Farm Act.

[APPENDIX 2]

Chronology of Implementation of Swampbuster

3/10/86 First notice #318 circulated to state and county offices on swampbuster provision, set forth intention to implement law literally.

3/12/86 Rep. Dorgan brought in Mike Dwyer, Steve Hoetzer, Cliff Issendorf, several legislative aides to discuss how N.D. was being punished for protecting wetlands longer than sister states of Minnesota, Iowa and Illinois who had converted most of their wetlands. They wanted an exemption from swampbuster. Wildlife Management Institute (Jahn), Wildlife Federation (Wenz) and Audubon (Hinkle) as well as CRS (Zinn) were present.

4/4/86 USDA issued notice #319 in response to "questions raised about notice 318 (March 10 notice) and set forth policy that a farmer would need to be informed whether or not his land was classified as wetland before he could be declared ineligible for program benefits."

5/1/86 USDA issued a "clarification of Notice CP-319" (April 4 notice) stating that USDA could not take back program benefits already provided in FY 86 before regulations were promulgated. But a farmer would have to certify that he had not converted wetlands to crop production after Dec. 23, 1985 or he would lose program benefits for each crop year in which he planted on converted wetlands.

5/28/86 Sen. Stevens enacted an exemption in the supplemental appropriations bill for tundra underlain by perma frost in Alaska. This exempted several hundred thousand acres of wetlands in central Alaska covered with brushy vegetation. No manipulation of soils is necessary, as brush is removed, soils thaw, and vegetables, barley and oats, can be grown. No wildlife effects at all.

6/27/86 Proposed interim rule published for comment in the Federal Register (2,696 comments submitted)

9/10/86 Sen. Andrews tried to freeze federal funds for swampbuster until regulations could be reviewed and approved by the full Senate Appropriations Committee. (Attached Post article on this move)

9/11/86 Amendment #2. USDA signed off on a "clarification" regarding "commenced" issue. Wetland conversion will be regarded as commenced if:

(A) A plan for the drainage of the area was approved through a vote of landowners in such area before 12/23/85.

(B) The county ASCS committee determines the approved plan for the drainage reasonably contemplated such person's drainage activity within the project area.

(C) The drainage activity is completed by January 1, 1995.

11/20/86 Amendment #5. USDA amended the ASCS Handbook to exempt individuals located within jurisdiction of water resource district boards. Wetlands converted by individual farmers will be exempt as "commenced" if the conversion was done by water districts, persons in the jurisdiction of a water district board, or similar entity, and (1) the plan for drainage was approved by landowners before 12/23/85; and (2) either

(A) Earth moving or land clearing to construct the drainage project had begun.

(B) A contract providing for the earth moving or land clearing had been signed by the appropriate parties.

(C) Substantial funds had been otherwise legally committed for the implementation of the drainage project.

and (3) the person's drainage activity was identified in or reasonably contemplated as a part of the drainage plan.

2/4/87 Amendment #6 further specified that the farmer's drainage activity needs to be specifically identified in the approved plan.

9/17/87 Final rule published in F.R. tightened some loopholes, left others highly discretionary.

POLITICAL MANEUVER IMPERILS WETLANDS

[From the Washington Post, Oct. 11, 1985]

By Ward Sinclair
Washington Post Staff Writer

Bowing to protests by a politically endangered North Dakota Republican senator, Agriculture Department officials have made changes in proposed soil conservation rules that could result in thousands of new acres producing surplus grain.

The changes came after Sen. Mark Andrews, an Agriculture Committee member facing an uphill reelection fight, threatened to bar USDA from carrying out the 1985 farm law's "swampbuster" section, which is intended to halt the conversion of fragile wetlands to crop production.

Andrews was angry because, as proposed by USDA, the pending regulations could have barred some North Dakota farmers from receiving any federal benefits if four major drainage projects converted wetlands into wheat and barley fields.

Generally, such projects are economically feasible only because of assurances that such crops will be eligible for federal crop loan protection and direct subsidy payments.

Deputy Secretary Peter C. Myers, who approved the change that satisfied Andrews, denied in an interview that politics played a part or that it weakened the strict congressional language.

But the decision—made before the public-comment period on the proposed regulations expired—has infuriated environmentalists and prompted officials of the Interior Department's Fish and Wildlife Service to ready a protest to the USDA.

"They've essentially thrown swampbuster out the window," said one Interior official.

At a House Agriculture Committee oversight hearing last week, Maureen K. Hinkle of the National Audubon Society described the USDA action as "a serious breach of administrative practice."

The Sierra Club's Daniel Weiss called it an "unprecedented action" that violates "letter and spirit" of the 1985 farm law. "At a time when USDA is spending billions to reduce overproduction, American farmers and taxpayers cannot afford to have tax dollars used for the conversion of still more wetlands to commodity production," he said.

Congress ruled that farm-program benefits would be denied to farmers who had not "commenced" drainage projects—that is, moved earth or spent significant amounts of money on them—before Dec. 23, when the bill was signed into law.

In one North Dakota county, more than 300 applications for drainage permits were filed in December in hopes of beating the deadline.

In its new interpretation, USDA said it would consider a project "commenced" if it had been approved by a vote of land owners before Dec. 23. This could clear the way for scores of wetlands conversions that otherwise would be ineligible for subsidies.

Although Myers denied a political connection, the sequence of events leading to the decision suggests cause and effect.

Andrews made his proposal on Sept. 9 at an Appropriations subcommittee meeting. When Chairman Thad Cochran (R-Miss.) objected, Andrews said he would wait until a Sept. 11 meeting of the full committee.

On Sept. 10, committee Chairman Jesse Helms (R-N.C.) and other farm-state senators circulated a letter warning that the amendment would encourage surplus crop production on drained wetlands.

Conservationists braced for a Sept. 11 battle, but Andrews surprised them. He did not offer his amendment and left the committee room without mentioning his objections.

What they did not know was that on Sept. 9 four top USDA officials had signed off on the new interpretation of "commenced" that would clear the way for the wetlands projects in North Dakota.

Myers gave final approval to the change on Sept. 11.

That same day, Andrews told the Fargo Forum, a newspaper in his state, that North Dakota no longer had a problem because he had persuaded Secretary Richard E. Lyng to "clarify" the swampbuster language.

A high-level USDA official who declined to be identified agreed that the decision could open a big loophole in the department's conservation program. But he said it was spurred by fears that Andrews and others might otherwise take stronger action.

Myers insisted that the changes "are not locked in cement." He said he had warned lower-level officials at USDA that the language would be subject to public comment until Oct. 25 and that it could possibly be reversed.

"I feel quite strongly about this," Myers said.

[APPENDIX 3]

Statistical Information and Background on North Dakota
for Swampbuster Hearing
January 26, 1988

I. Commodity Program Participation in North Dakota:

Commodity	Eligible base acreage (million acres)	Percentage of base enrolled
Wheat	12.8	98
Corn	1.2	95
Barley	3.4	95
Oats	1.2	85
Sorghum	0.007	91

North Dakota's participation rate is the highest in the country.

In the next chart, direct payments are more reflective of program costs because the government's receipts for commodities acquired under loan and other price support programs are not accounted for by this data.

Gross federal payments (CCC) to North Dakota farmers, 1987

Payment type (million of dollars)	
9.3	Dairy
821.0	Commodity loans, purchases, and other price supports
167.2.1	Direct deficiency payments, feed grains
500.1	Direct deficiency payments, wheat
1.6	Direct deficiency payments, wool
69.6	Grain reserve
13.2	CRP rental payments
1,582.0	Gross total

II. Wetlands in North Dakota

North Dakota has lost 60 percent of its wetlands.

Prairie Pothole Emergent Wetland Loss (millions of acres)

	Originally	Remaining
Minnesota	12.5	3.5
North Dakota	5.0	2.0
South Dakota	2.0	1.3
Iowa	2.3	0.026

The region is estimated to be losing 1 to 2 percent of its wetlands to agriculture each year. North Dakota is thought to be losing the most at a pace of 15 to 25,000 acres per year.

North Dakota's prairie potholes support 140 different species of birds and produce half the duck raised in the lower 48 states -- 2 to 3 million each year. Even small potholes which may only be wet in the spring are valuable to waterfowl for the food produced in them.

Prairie potholes also provide flood control, reduce run off and sedimentation, and recharge ground water.

III. Other Federal Programs Concerning Wetland in North Dakota

The Fish and Wildlife Service (FWS) is authorized to purchase wetlands outright and to purchase easements on wetlands. In North Dakota, FWS went about buying 328,000 acres and acqiring easements on 1,250,000 acres of wetland until a 1977 North Dakota law made their activities illegal. Farmers and politicians claimed federal interference in North Dakota matters. In 1983, the U.S. Supreme Court overturned the 1977 law.

The Water Bank Act of 1970 authorizes the Agricultural Stabilization and Conservation Service (ASCS) of the U.S. Department of Agriculture (USDA) to enter into ten year contracts with farmers, making anual rental payments for the preservation of wetlands and adjacent upland. The ASCS targets wetland regions which are especially valuable and vulnerable to conversion.

Under the Water Bank program, North Dakota receives more rental payments than any other state. Of the $7.0 million worth of Water Bnak contracts signed in 1987, $2.4 million of them were in North Dakota.

Water Bank Status as of 9/30/87

	Allocated for new contracts	acres under contract
North Dakota	$3,185,000	166,000 acres
Total program	$8,400,000	513,172

The number of acres enrolled in this program is steadily declining because of decreased funding and rising rental costs. From 1972 to 1981, the program was funded at the authorized level of $10 million per year, but in 1982 the appropriations level dropped to $8.8 million, and in 1986 it dropped to $8.371 million per year, where it remains today. At this decreased funding level and because of the higher rental costs, the total number of contracts which expire each year cannot be renewed, and number of acres continues to decline.

A potential problem with the Water Bank program is that type I and II wetlands are not eligible unless associated with other wetlands entered in the program.

According to Fish and Wildlife sources, swampbuster has not halted the drainage of wetland. On a nationwide basis, only two farmers have been denied subsidies in Minnesota and Georgia, and in North Dakota, drainage activity has proceded as before, according to sources in the state: the fall following enactment of the 1985 Farm Act, farmers did not react to the swampbuster provision by either accelerating or ceasing wetland conversion. The next fall, however, a sharp increase in drainage was noted by observers and acknowledged by farmers, drainage companies, water districts. The cause of the increase, however, was not cited as a reaction to swampbuster, but because of fair weather which gave the farmers the time to go out into the fields with their heavy equipment.

Both North Dakota and Minnesota Fish and Wildlife Service sources state that their people have made "dozens and dozens" of reports of suspected violations, in writing, to ASCS, but to no avail. The ASCS response is typically to write the farmer a letter, telling the farmer that the Fish and Wildlife Service reported them -- thereby perpeptuating farmer antagonism toward FWS. Most of these cases are exempted under a commenced ruling.

ASCS is supposed to run a 20% spot check for swampbuster compliance.

IV. Conclusion

North Dakota farmers are feeling an economic crunch, need the federal subsidy payments, and want to expand their production acreage. Minnesota farmers are also experiencing economic hardship.

At the same time farm expansion should be discouraged because of over production and excess surplus levels. Swampbuster was enacted as much for the purpose of slowing down farm expansion as to provide habitat for ducks.

1987 Ending Stocks for Selected Commodities

Wheat	1.821 (billions of bushels)
Corn	4.123
Barley	0.293
Oats	0.115
Sorghum	0.682

The Acreage Reduction Program (ARP), the Paid Land Diversion (PLD) program and other programs have been established to set aside base acreage to help reduce surpluses. In 1988 they shall be continued at the high level of 27.5% (25% ARP/2.5% PLD) for wheat and at 20% (17.5% ARP/2.5% PLD) for feed grain acreage. In North Dakota, that means 4.76 million acres will be set aside, more than the TOTAL wetland acreage that remains in the whole state!

Acreage set aside under commodity programs in North Dakota, 1987

Wheat	3,500,000 (acres)
Corn	290,000
Barley	746,000
Oats	228,000
Total	4,764,000

Times maybe tough for farmers in North Dakota, but expansion will not help farmers, and will definitely destroy precious wetlands.

Letter From Wayne Baron, Director, Prairie Wetlands Resource Center, National Wildlife Federation

The Honorable Quentin N. Burdick
Chairman, Subcommittee on Agricultural
Development and Related Agencies
Senate Committee on Appropriations
511 Hart Senate Office Building
Washington DC

January 28, 1988

Re: Special hearing on Implementation of the Swampbuster Provision of the 1985 Farm Act, January 26, 1988

Dear Chairman Burdick:

This letter constitutes a supplement to our statement submitted for the Swampbuster hearing held before your Subcommittee on January 26, 1988. This supplement to our statement addresses two questions asked of other witnesses during the hearing.

You asked the question of whether various witnesses thought that Swampbuster should cause loss of elegibility if a producer drains a one-quarter acre wetland on a 640-acre farm. In response, we believe that Swampbuster does and should apply to such a situation, assuming that no exemptions apply and that the producer plants an agricultural commodity on the converted wetland.

The value of a wetland is not always a function of size. Very small wetlands can be very valuable. To illustrate this point, wetlands whose basins are smaller than <u>one</u> acre make up nearly 13 percent of the total prairie pothole wetland acreage. In fact, nearly half of the prairie pothole acreage consists of wetlands smaller than ten acres. (Source: U.S. Fish and Wildlife Service's Northern Prairie Wildlife Research Center in Jamestown.) Therefore, it is obvious that eliminating Swampbuster coverage for wetlands that are relatively small in relation to a total farm's acreage would eliminate protection for a substantial portion of an important resource. Since these smaller wetlands are just as important as the larger ones, such an exemption would be irrational.

Senator Bumpers also asked a question regarding the appropriate role for the U.S. Fish and Wildlife Service in administering Swampbuster. We believe that FWS should play a substantial role in all aspects of Swampbuster. Many speakers at the hearing alluded to potential manpower shortages in USDA as hampering Swampbuster administration. If that is true, then full participation by FWS simply increases the number of federal personnel available to make the program work. In addition, FWS has been working on wetlands issues for many years and has amassed a great deal of experience that is very valuable for USDA and producers. Finally, Swampbuster will not work unless it is adequately enforced and, again, manpower is a critical componenent of an effective enforcement program. Good enforcement creates a powerful deterrent effect which by itself lessens the burden on federal administrators. Therefore, we urge USDA to adopt a regulation similar to one adopted by the Army Corps of Engineers in enforcing Section 404 of the Clean Water Act. The Corps' regulation reads:

> <u>Surveillance.</u> To detect unauthorized activities requiring [404] permits, district engineers should make the best use of all available resource. Corps employees; members of the public; and representatives of state, local, and other

> Federal agencies should be encouraged to report suspected violations. Additionally, district engineers should consider developing joint surveillance procedures with Federal, state, or local agencies having similar regulatory responsibilities, special expertise, or interest.

33 CFR 326.3(a) (1987). USDA should adopt a similar rule or policy. At the hearing, Mr. Hertz stated that "sometimes the Fish and Wildlife Service gives us more help than we need" or words to that effect. Judging from the lack of enforcement of Swampbuster documented from USDA data, USDA actually needs all the help it can get. FWS is a highly valuable source of such assistance.

National Wildlife Federation appreciates your courtesy in holding the record open until January 28.

Sincerely,

Wayne Baron 6/89

Wayne Baron
Director
Prairie Wetlands Resource Center

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